TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 39.

WILLIAM W. BRAUER AND FREDERICK C. BRAUER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF W. W. BRAUER & COMPANY, AND THE RELIANCE MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, APPELLANTS,

vs.

COMPANIA DE NAVIGACION LA FLECHA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED MARCH 29, 1895.
CERTIORARI AND RETURN FILED APRIL 16, 1895.

(15,849.)

(15,849.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 249.

WILLIAM W. BRAUER AND FREDERICK C. BRAUER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF W. W. BRAUER & COMPANY, AND THE RELIANCE MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, APPELLANTS,

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a United States Circuit Court of Appeals for the Second Circuit.

WILLIAM W. BRAUER and Others, Libellants and Appellants,
vs.
COMPANIA NAVIGACION LA FLECHA, Respondent and Appellant.

Transcript of Record.

Appeal from the district court of the United States for the southern district of New York.

Printed under the direction of the clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Jul- 30, 1894. John A. Shields, clerk.

1 United States District Court, Southern District of New York.

WILLIAM W. BRAUER *et al.*, Libellants,
vs.
COMPANIA DE NAVIGACION LA FLECHA, Respondent & Appellant.

Statement.

1892.
March 25. Libel filed.
July 8. Answer filed.
1893.
Jan'y 19 & 20 & April 13. Cause tried before Hon. Addison Brown, U. S. district judge.
July 8. Opinion rendered.
Oct. 25. Interlocutory decree filed.
1894.
Feb'y 12. Commissioner's report filed.
" 14. Exceptions to commissioner's report filed by libellants.
" 15. Amended exceptions to commissioner's report filed by libellants.
" 15. Exceptions to commissioner's report filed by respondents.
March 13. Exceptions to commissioner's report argued.
April 26. Opinion rendered by Judge Brown.
May 7. Final decree filed.
" 11. Notice of appeal filed by libellants.
" 11. Notice of appeal filed by respondents.

2 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of William W. Brauer and Frederick C. Brauer, copartners, doing business under the firm name of W. W. Brauer & Company, and The Reliance Marine Insurance Company, Limited, of

Liverpool, a corporation organized under the laws of Great Britain, against Compania de Navigacion la Flecha, a corporation organized under the laws of Spain, in a cause of contract, civil and maritime, alleges as follows:

First. On or about October 24th, 1891, the libellants, William W. Brauer & Company, being the owner of 165 head of cattle of the value of sixteen thousand five hundred dollars, shipped the same in good order and condition on board the steamship *Hugo*, then lying in the port of new York and bound to the port of Liverpool, in England, and to be carried to said port, and the said shippers thereupon received from the master or agent of said steamer a bill of lading, whereby he did undertake on behalf of the owner of said vessel, to carry the said cattle to Liverpool, and there to deliver the same to the said shippers or their order, they paying freight therefor. At the time of the shipment aforesaid the respondent Compania de Navigacion la Flecha was the owner of said steamship *Hugo*.

Second. On or about October 24th, 1891, the said steamer sailed from the port of New York having said cattle on board. On or about October 31st, 1891, the said vessel having encountered some rough weather, the master and crew of said vessel became panic-stricken and drove overboard one hundred and twenty-six head of cattle. The said vessel did not incur any extraordinary or unusual stress of weather, and the act of said master and crew in driving overboard said cattle was wholly unnecessary, and the loss of said cattle was due to the incompetency and lack of skill of the master and crew.

3 Third. Thereafter the said vessel arrived safely in the port of Liverpool, and delivered to the shippers or their agent 38 of said cattle, in good condition (one having died), but failed to deliver the 126 head, although the said shippers have at all times been ready and willing to receive the said cattle and pay the freight therefor.

Fourth. The libellant, The Reliance Marine Insurance Company, Limited, of Liverpool, on or about October 26th, 1891, issued to William W. Brauer & Company a policy of insurance, whereby in consideration of a premium to it paid, it did insure the said William W. Brauer & Company, for account of whom it might concern, against perils of the seas, jettisons, barratry of the master and mariners, and all other perils, losses and misfortunes that might come to the hurt, detriment or damage of said cattle, to the extent of $75 per head, the said cattle being valued in said policy at the sum of $100 per head.

Fifth. Thereafter, and on or about November 30th, 1891, the Reliance Marine Insurance Company, Limited, of Liverpool, paid to the said William W. Brauer & Company the insurance on said 126 head of cattle and received from said shippers an assignment and transfer of all rights of action which said shippers might have against said steamship *Hugo* or against the owners thereof for any loss, damage or destruction to or of said cattle to the extent of such payment.

Sixth. By reason of the premises these libellants have sustained

damage to the amount of twelve thousand six hundred dollars, for which they claim reparation in this suit.

Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this honorable court.

4 Eighth. The said Compania de Navegacion la Flecha is a foreign corporation, and is not within this district and cannot be found therein, but has goods and chattels within this district, to wit, the steamer *Enrique*, now lying in the port of New York, at South Fourth street, Williamsburgh, and credits and effects, to wit, moneys in the hands of H. Maitland Kersey of said city.

Whereupon the libellant- prays that a warrant of arrest, in due form of law, according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said Compania de Navegacion la Flecha, and that it may be required to answer on oath this libel and the matters herein contained, and that, if it cannot be found, then that its goods and chattels in this district may be attached to a sufficient amount to answer the libellant-, and if sufficient goods and chattels cannot be found in this district, then that its credits and effects in the hands of said H. Maitland Kersey may be attached to a sufficient amount to answer the libellant-, and that said H. Maitland Kersey may be cited to appear and answer such interrogatories as may be propounded to him by the libellant-, and that this honorable court will be pleased to decree to the libellant- the payment of the amount which shall be due to *him* for the cause aforesaid, with interest and costs, and to give *him* such other and further relief as in law and justice *he* may be entitled to receive.

WILLIAM W. BRAUER.
FREDERICK C. BRAUER.
RELIANCE MARINE INS. CO., LIM.,
OF LIVERPOOL,
Per HENRY DESPARD, *Att'y.*

MacFARLAND & PARKIN,
Libellants' Proctors.

5 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry Despard, being duly sworn, says that he is the attorney-in-fact of the libellants, W. W. Brauer and Frederick C. Brauer, who reside in Richmond, Virginia, and of The Reliance Marine Insurance Company, Limited, of Liverpool, which is a corporation organized under the laws of and resident in Great Britain, and that the foregoing libel is true to the best of his knowledge and belief.

HENRY DESPARD.

Sworn to before me this 25th day of March, 1892.

[SEAL.] W. D. DESPARD,
Notary Public, Kings County.

Certificate filed in New York county.

(Endorsed:) Libel. Filed M'ch 25, 1892.

To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

Compania de Navigacion la Flecha, proceeded against in this court upon the libel of William W. Brauer, Frederick C. Brauer, and the Reliance Marine Insurance Company, Limited, of Liverpool, answers the said libel as follows:

First. The respondent admits the allegations in the first article of the said libel contained, except that, upon information and belief, it denies that the value of the said cattle was $16,500, and avers that the receipt, transportation, and delivery of the cattle were subject to the terms and conditions of a written contract entered into between the libellants, W. W. Brauer & Co., and H. Maitland Kersey, bearing date October 10th, 1891, and the bill of lading issued by or on behalf of said steamer to the said libellants, W. W. Brauer & Co, bearing date October 24th, 1891, and it de-
6 mands that the said bill of lading and said contract be produced by the libellants.

Second. The respondent admits that the *Hugo* sailed from the port of New York with 165 cattle on board on or about the 24th of October, 1891, and that thereafter and in the course of the said voyage and on or about October 31st, 1891, 126 head of said cattle were lost, and it denies each and every other allegation in the second article of the said libel contained.

Third. The respondent admits the allegations in the third article of the said libel contained, except that it avers that the freight on the entire 165 cattle was, by agreement, prepaid in New York.

Fourth. The respondent has no knowledge or information sufficient to form a belief as to the matters alleged in the fourth and fifth articles of the said libel contained, and therefore denies the same.

Fifth. The respondent admits the jurisdiction of the court, except that it avers that the court is bound by the terms of the said contract and bill of lading to interpret the said contract according to the rules of law as administered in the courts of Great Britain, and if this court is powerless to administer such rules of law, then the respondent denies the jurisdiction of this court to entertain this cause; and it denies each and every other allegation in the sixth and seventh articles of the said libel contained.

Sixth. The respondent admits the allegations of the eighth article of the said libel contained.

Seventh. Further answering the said libel, the respondent avers, by the terms and conditions of the contract and bill of lading under which the said cattle were received for transportation and delivery it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond his control, by the perils of the seas or other waters, or by other accidents of navigation,
7 even when occasioned by the negligence, default, or error in judgment of the master, mariners, or other servants of the ship-owner, and that the cattle were carried on deck at the owner's risk and under a special provision that the steamer should not be

held accountable for accident to or mortality of the animals from whatsoever cause arising. There was a further provision that the contract should be construed and governed by the law as administered in the courts of Great Britain, with reference to which law the contract was stated to be and was made.

And the respondent avers that the loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattle-houses and set the cattle adrift, and that during the continuance of the perils and by reason thereof, certain of the cattle were washed overboard and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or hopeless condition, and that upon such being taken to the gangways, they were washed over by the seas which were at the time so raging that one of the seamen of the steamer was washed from the deck into the sea.

And the respondent avers that the care given to said cattle was according to the best judgment of the master of said steamer, and that if he erred in his judgment or was in any degree negligent, which the respondent denies, that still this respondent is absolved from accountability and responsibility by reason of the terms of the bill of lading; and also that, by the law as administered in the courts of Great Britain, the respondent, being itself without fault, is validly, under the terms of the said contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of the master, mariners or other servants of the respondent.

Wherefore the respondent demands judgment that the libel herein be dismissed with costs.

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent.

8 CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

H. Maitland Kersey, being duly sworn, deposes and says that he is the agent in New York of the above-named respondent, and is authorized to make this verification on its behalf; that he had read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the sources of deponent's knowledge and the grounds of his belief are communications had personally by deponent with the libellants, original documents and papers in deponent's possession relating to the matters referred to in the libel, and the statements made by officers and crew of the *Hugo* respecting the circumstances of the voyage referred to in the libel.

Deponent further says that the respondent is a foreign corporation, none of whose officers reside within this district or within the United States, but, on the contrary, reside abroad, where they now are, as deponent believes.

H. MAITLAND KERSEY.

Sworn to before me this 7th day of July, 1892.

[SEAL.] WASHINGTON E. PAGE,
Notary Public (73), *New York Co.*

(Endorsed:) Answer. Filed July 8, 1892.

9 United States District Court, Southern District of New York.

W. W. BRAUER & Co.
vs.
COMPANIA DE NAVIGACION LA FLECHA. } Before Hon. Addison Brown, Judge.

NEW YORK, *January* 19, 1893.

Appearances: Messrs. MacFarland & Parkin, for libellants; Messrs. Butler, Stillman & Hubbard (Mr. Mynderse and Mr. Cromwell), for respondents.

Present: Messrs. MacFarland and Parkin, for libellants; Mr. Cromwell, for respondent.

Counsel for libellants offer in evidence the assignment from W. W. Brauer & Company to the insurance company of their claim against the *Hugo*, to the extent of the insurance.

The assignment is marked Libellants' Exhibit 1.

Libellants rest.

Counsel for respondent offers in evidence the depositions of—
Alexander Mudie, chief engineer.
Pomingo Zaldegui, boatswain.
Pedro Echeverria, carpenter.
Julian Ormaechea, first officer.
Jose R. Enchortiata, an apprentice.
Jose Antonio Gartiez, master.

10 United States District Court, Southern District of New York.

WILLIAM W. BRAUER & COMPANY and Others }
against
COMPANIA DE NAVIGACION LA FLECHA. }

Depositions on behalf of the respondent, taken pursuant to notice, before William F. Judson, a notary public, on July 29th, 1892, at 54 Wall street, New York city.

Appearances: Messrs. Butler, Stillman & Hubbard (Mr. Cromwell), for the respondent; Messrs. MacFarland & Parkin (Mr. Parkin), for the libellants.

ALEXANDER MUDIE, being duly sworn and examined as a witness for the respondent, testified:

By Mr. CROMWELL:

Q. What is your occupation, Mr. Mudie?
A. Marine engineer.

Q. How long has that been your occupation?
A. 14 or 15 years.
Q. How long have you been an engineer?
A. 34 years.
Q. How long have you been a chief engineer?
A. 14 years.
Q. In what class of vessels have you been engineer?
A. Vessels ranging from 700 to 2,000 tons.
Q. Mention some of the vessels.
A. Spanish, the *Galuno*, and *Diego*, and *Sofia*, *Federigo*, all in Fletcher's employ.
Q. With what steamer are you now connected?
A. The *Hugo*.
Q. You are chief engineer of her?
A. Yes, sir.
Q. How long have you been on the *Hugo*?
A. Seven years.
Q. As chief engineer all the time?
A. Yes, sir.
Q. What kind of an engine has the *Hugo*?
A. She has got what is called the ordinary kind with high and low pressure, cylinder direct acting.
Q. How many horse power?
A. About 300 nominal.
Q. Is it a good engine?
A. Yes, sir.
Q. In good repair?
A. Yes, sir.
Q. Was in October last?
A. Yes, sir.
Q. You were on the *Hugo*, were you not, in October last?
A. Yes, sir.
Q. Where was the *Hugo* about the 24th of October?
A. I presume she would be about off the banks, I am not sure.
Q. She started on her voyage from New York on that day, didn't she?
A. Yes, sir.
Q. And you were chief engineer?
A. Yes, sir.
Q. How was the weather during the first part of that voyage?
A. It was very good weather.
Q. How was the engine running?
A. Well.

Witness produces book which he identifies as engineer's log.

A. (continued). The engine was in first-class condition.
Q. How was the weather for the first few days?
A. The weather was favorable for the first two or three days.
Q. How many revolutions did your engine make?
A. About 50.
Q. Averages about 50 a minute?

A. Averages about 50 a minute.

Q. Did you make any change in the speed of the engine about the 30th or 31st of October?

A. Well, we generally slow down a little, but it is just to ease the engine.

12 Q. On the afternoon of the 30th of October did you make any change in the speed of the engine?

A. No, we just got the order to stop from the bridge.

Q. Did you stop?

A. Yes, sir.

Q. How long did you remain stopped?

A. Well, we were stopped the whole of 35 or 36 hours.

Q. On that afternoon, were you?

A. That afternoon, but commencing on the——

Q. You had better look at your log.

A. (Looking at log.) We stopped at 8.15.

Q. How long did you remained stopped?

A. 45 minutes.

Q. How did you get the order?

A. By telegraph.

Q. And what was the order?

A. To stop.

Q. And at the end of the 45 minutes, what did you do?

A. We went ahead.

Q. Full speed?

A. Full speed.

Q. What was the next change that you made in the speed of the engine?

A. We stopped the following morning altogether at 2.30.

Q. How long did you remain stopped then?

A. We stopped then the whole time, the 35 or 36 hours.

Q. All that next day?

A. Yes, sir.

Q. From 2.30 a. m.?

A. We stopped at 2.30 p. m.

Q. At 2.30 p. m. the dext day, the 31st?

A. Yes, sir.

Q. And remained stopped how long?

A. Until the 2d of November.

Q. At what time?

A. Full ahead at 5 o'clock.

Q. In the morning?

A. Yes, in the morning.

Q. What was the condition of your engine and fires during that period of about 36 hours when you remained stopped?

A. Well, I was ready to go at any moment.

Q. Fires all alive?

A. Yes, and men on watch.

Q. What was the occasion of the stopping, did you learn?

A. It was to make the ship behave better and to save the cattle

as much as we could do; the ship was rolling fearfully with the cattle until we stopped, and we was perfectly still then.

13 Q. Was there a storm during that time?

A. Yes, sir.

Q. Severe?

A. Yes, very.

Cross-examination by Mr. PARKIN:

Q. Did you make the entries on the log yourself?

A. Myself.

Q. What hours during the day did you make the entries in the log?

A. Well, we generally make the log up at noon, when there is anything extra occurring; there is a blackboard down in the engine-room where all these notices are put up, "Stopped at two or three, consumption of oil," and so on.

Q. *When* did you make the entries on this log which has been noticed, and the entries on October 30th and November 2d?

A. On board the steamship *Hugo*.

Q. Did you make these entries every day?

A. Every day.

Q. During those days?

A. During those days.

Q. Did you enter in your log every order that you received?

A. Well, not exactly every order; every order we get from the bridge, to stop or anything of that sort, we do.

Q. Are you quite positive that you have entered in this log every order that you received during those days?

A. Yes, to the best of my knowledge.

Q. Were you in the engine-room all the time during those days?

A. Yes, back and forth, up and down.

Q. You were not on deck at all?

A. Occasionally.

Q. Did you remain on deck at all?

A. No, I was anxious to see the ship getting right as well as the rest of them; I had nothing to do with the deck further than going up and down, just.

Q. In what business was the *Hugo* engaged before this voyage?

A. To New Orleans we made our last voyage.

Q. I mean prior to last October.

A. Well, I couldn't exactly tell that; our regular trade

14 was to New Orleans and Baltimore and the various American ports.

Q. Had you carried cattle before?

A. Oh, yes.

Q. You didn't enter in your log the rate at which the wind was blowing at all; you had no means of ascertaining that?

A. No, I don't know.

Q. And you don't know, as a rule, anything that happens on deck?

A. Well, if we are running along, or the wind is on the starboard or the port side or anything like that.

Q. But it is no part of your business to enter in your log anything about what has to do with the operation of the engine, I suppose?

A. Well, I have a place here for it, for general statements, I suppose (indicating in log book).

Q. That is not the general ship's log, though; that is only the engineer's log?

A. Only the engineer's log.

Q. How many knots an hour does the vessel make with fifty revolutions a minute?

A. About eleven.

Q. How long is the *Hugo*, do you know?

A. 375 feet long, I think.

Q. (Indicating in log book). What are these entries under the general remarks for revolutions; are those the numbers of revolutions?

A. Yes, during the 24 hours.

By Mr. CROMWELL:

Q. When do you expect to sail?

A. Thursday or Friday of next week, I believe.

DOMINGO ZALDEGUI, being duly sworn and examined through an interpreter, for the respondent, testified:

By Mr. CROMWELL:

Q. What is your occupation?

A. Boatswain.

Q. How long have you followed the sea?

A. 18 years.

Q. In what capacities?

A. Sailor, and 11 years as boatswain.

15 Q. With what vessel are you now connected?

A. On the steamship *Hugo*.

Q. Were you connected with her in October last?

A. Yes; I have been 7 years employed on her.

Q. Was the *Hugo* in New York in October last?

A. Yes.

Q. When did she sail from New York?

A. I don't remember the date.

Q. Some time during the latter part of October, was it?

A. About that.

Q. What kind of a cargo did the *Hugo* take on that voyage?

A. Grain, cotton and sundries.

Q. For what port was she bound?

A. For Liverpool.

Q. Did she carry any deck cargo?

A. Cattle.

Q. About how many, do you know?
A. I believe 175.
Q. But you don't know exactly?
A. No.
Q. Where were those cattle stowed?
A. From the cabin forward and from the cabin aft.
Q. Along the bulwarks?
A. They were in the pens that had been made by the cattlemen themselves.
Q. Where were those pens built on deck?
A. On both sides, in the middle, and over the hatches.
Q. Do the red lines upon the plan which I now hand you truthfully represent the way in which those cattle pens were built on board the *Hugo*, at that time?
A. Yes, sir.
Q. And do the black lines in the center truthfully represent the deck-house, engine-room, hatches, etc.?
A. Yes, it represents the permanent standing houses on deck and the hatches.
Q. Were there any cattle opposite the deck-house and engine-room?
A. No, sir.
Q. What was the weather like when you started from New York on that voyage?
A. Good weather.
Q. How long did the good weather continue?
A. Up to the 29th of October.
Q. What occurred then?
A. The wind began to freshen.
Q. How was the sea?
A. Somewhat agitated.
16 Q. Was there any damage done that day to the cattle pens or to the cattle?
A. No, sir.
Q. How was the weather that night and the next day?
A. Rain storms.
Q. How was it as to the violence of the wind and the sea?
A. On the night of the 29th not much strength; somewhat more fresh on the following day.
Q. How was it on the afternoon of that day?
A. Dark.
Q. How was it as to the violence of the wind and sea?
A. The weather was growing worse and the seas were rising, but it wasn't so bad yet as to interfere with the navigation of the vessel.
Q. On the afternoon of that day, was it bad enough to have any effect upon the cattle or cattle pens?
A. Not on the 30th; we were going under full speed.
Q. How was it the next day?
A. Very heavy sea, and a strong wind.
Q. What was the effect of the weather that day upon the cattle pens and the cattle?

A. Breaking some of the houses on the port side on the afternoon of the 31st.

Q. Do you remember what day of the week this was?

A. No, sir.

Q. What was done with the ship?

A. The engine was stopped.

Q. What was done by the men?

A. Repaired the houses.

Q. They had broken that day?

A. Some of them had broken on the 31st.

Q. What pens had broken?

A. Those opposite No. 4 to port.

Q. On the port side of No. 4 hatch?

A. On the port side of No. 4 hatch.

Q. Did the cattle come out?

A. Yes, sir.

Q. What broke the pens?

A. The seas.

Q. Who repaired the pens?

A. They were repaired among all of us.

Q. All the members of the crew of the *Hugo?*

17 A. All the members of the crew of the *Hugo* with the exception of the man at the wheel.

Q. Didn't the cattlemen make the repairs?

A. No, sir.

Q. Where were the cattlemen?

A. Wherever they could be away from the seas and the water; wherever they could hide themselves away from the seas and the water.

Q. Were the cattle put back and the pens repaired by the crew?

A. Yes, sir.

Q. Did the steamer remain hove to all the time that these repairs were making?

A. Yes, sir.

Q. After the repairs were made, what was done with the steamer?

A. Then the engine was started again.

Q. Did anything further occur that afternoon?

A. They opened the small gangways on the port and starboard sides (opposite the house) on each side, and No. 4 to starboard.

Q. What was the condition of the cattle and the pens at the time that the gangways were opened?

A. The houses that we had repaired had broken immediately after, and the cattle thrown around, some laying down, and some with broken legs, and getting along as best they could.

Q. How had they become so injured?

A. By the second breakage of the houses.

Q. Had any of the cattle pens become broken the day before the gangways were opened?

A. The same day, on the 31st.

Q. What was the condition of the cattle in the pens forward on this day—did you observe?

A. In fair condition on the 31st.

Q. On the latter part of the 31st, what was the condition of the cattle in the pens in the centre of the ship aft?

A. Some were half dead, others with broken legs.

Q. Were the pens broken?

A. Yes, sir.

Q. Had the crew made any efforts to mend the pens and get the cattle back in their places?

A. Yes, sir.

Q. Did you succeed?

A. Yes, sir; when the engine stopped.

18 Q. Did they stay mended?

A. After they were repaired they remained so. They were broken again in the afternoon.

Q. Had the cattle sustained any injury by reason of the breaking of the pens and the pitching of the steamer?

A. Yes, sir.

Q. How were they injured?

—. By the breakage of the sea.

Q. Describe fully the condition of the animals themselves.

A. They were thrown down, and could not stand up because their legs were broken.

Q. Were they injured in any other way?

A. Some had their horns broken, and others were unable to rise.

Q. How was the sea at this time?

A. Very heavy.

Q. Did waves wash over the vesssel?

A. From bow to stern.

Q. Did this occur frequently?

A. Yes, sir.

Q. How frequently?

A. From the windward they came in one after the other, and from leeward they came in with the lurch of the vessel.

Q. Were any cattle washed overboard?

A. When the gangways were opened; yes.

Q. After the small gangways on the starboard and port sides had been opened and the large gangway opposite No. 4 hatch, how were the wind and the sea as compared with what they had been before that?

A. It was pretty much in the same condition, but the seas were getting heavier every time.

Q. How many cattle washed overboard?

A. On the 31st, many dead, we directed to have thrown overboard, and some of the live ones followed the dead of their own accord.

Q. What was the effect of the waves and the tossing of the vessel upon those cattle that remained on board?

A. It was impossible for them to remain standing.

Q. Were they thrown down, injured, tossed around the vessel?

A. Owing to the movement of the vessel, they could not retain

their footing, and when they fell the seas would carry them out of the gangways.

Q. Did it seem to injure them to be tossed around the decks in this way, before they were washed over?

19 A. They were more or less injured, because with the breakage of the houses they were struck by the pieces of the lumber, and many were going around fastened together with those boards; the main supports of the houses had been broken.

Q. How was the weather on the night of the 31st?

A. Regular hurricane all night, and the engine stopped.

Q. Did you sleep that night?

A. Nobody.

Q. Did you look at the cattle next morning?

A. Yes; the decks was a regular slaughter-house; all the cattle-houses were broken.

Q. What was the condition of the cattle?

A. The main portion of them were dead, and a great many were with broken legs, and some were alive from hatch No. 2 forward.

Q. What was then done to the gangways forward, anything?

A. We opened the gangways by order of the captain.

Q. Which gangways?

A. No. 3 to starboard.

Q. The one opposite No. 3 hatch?

A. The one opposite No. 3 hatch.

Q. How was the sea at this time?

A. It was so heavy that we could hardly look at it; it was breaking from one side to the other.

Q. What was the effect of opening the gangway?

A. We fixed some ropes so as to hoist and pull over those that were dead and with legs broken, so as to pull them opposite to the gangway.

Q. Were they washed overboard?

A. They were, and among the dead there were also some that were alive that would jump overboard.

Q. Were any of the crew washed overboard by the violence of the weather at that time?

A. The sea carried five or six of the oxen and one of the men.

Q. Who was he?

A. One of the sailors.

Q. Were you able to save him afterwards?

A. Yes, sir.

Q. How?

A. We threw a life-preserver, and afterwards a rope.

Q. Was the vessel lying to at this time?

A. Yes, she was lying to, but leaning to one side.

Q. To which side?

A. To starboard.

20 Q. Were you able to take your breakfast that morning?

A. Not before eleven o'clock.

Q. Was that because of the roughness of the weather?

A. Yes, sir.

Q. How long did the vessel remain lying to?
A. All the night of the 31st.
Q. Do you remember what day of the week it was that the gangway opposite No. 3 hatch was opened?
A. I don't remember the day of the week, but it was the first of November.
Q. Where were the cattlemen during this storm?
A. In their cabins.
Q. Why were they not on deck?
A. I don't know.
Q. Have you been on ships carrying cattle before this voyage?
A. Yes, sir.
Q. In your judgment, if the weather had come back to ordinary conditions, could the cattle that were lost have lived or been saved?
A. Not one of them; they were all badly injured.

Diagram above referred to is offered and marked Claimants' Exhibit No. 1, July 29th, 1892.

Q. You don't understand English at all, do you?
A. No, sir.
Q. Are you going to sea again on the *Hugo?*
A. I hope so.
Q. When does she sail?
A. When the captain orders.

Cross-examination by Mr. PARKIN:

Q. Will you describe how these cattle pens were built?
A. I can't exactly explain it; the carpenter makes it; I am not a carpenter.
Q. Do the cattle pens consist of posts set up upon the deck of the vessel, and boards or planks dividing them off into spaces, each space containing four cattle?
A. Six, or four or five, and sometimes three.
Q. How were the posts fastened to the deck?
A. They were fastened to the rails with nails, with screws and with iron braces.
Q. How large were the posts?
21 A. (Indicating about half the width of an ordinary sheet of legal cap.) About so large.
Q. Were the posts nailed to the deck at all?
A. I don't know. I can't say what I don't know.
Q. How many boards separated each pen from the next one?
A. They were up as high as an ox, and they came together.
Q. How did the cattle face in the pens, inboard or outboard?
A. Inboard.
Q. How many planks were there in front of each pen?
A. I don't know; the full length of the houses.
Q. I mean up and down, one above the other; were they solid or were they separated?
A. Only one to tie the cattle to.

Q. How were these planks fastened to the posts?
A. With iron braces.
Q. Did the cattle stand on the deck, or were there planks under them?
A. There was a wooden flooring.
Q. Were there any cleats on this flooring or braces?
A. They were nailed to the deck.
Q. Were there any little pieces of wood on this flooring for the cattle to put their feet against?
A. Yes, cross-pieces.
Q. Which one of the pens was the one first broken?
A. Those on the port side opposite No. 4 hatch.
Q. What part of that pen was broken, the head-board where the cattle were, or on the sides of the pen?
A. All up and down the pieces were carried clean across the ship.
Q. How many of the pens were broken this time?
A. Two or three, or something like that.
Q. Did the posts fall down?
A. Everything came down.
Q. How was the vessel heading at this time?
A. Heading for Liverpool.
Q. On what side was the wind blowing?
A. On the port.
Q. The vessel was not heading against the wind, then?
A. No; the wind was on the beam.
Q. And were the waves on the beam also?
A. Also.
22 Q. Were the waves heavy at this time?
A. Pretty fairly thick.
Q. Was the engine stopped before the pens were broken?
A. No, sir.
Q. How many cattle came out of the pens at this time?
A. I am not sure; eight or ten; I didn't count them.
Q. After the pens were repaired, did the steamer go ahead again?
A. Yes, after having put the cattle in their pens again.
Q. When were the pens broken again, the same day or the next day?
A. On the same day, on the 31st.
Q. Were they broken the first time on the 31st?
A. Yes, sir.
Q. Were the gangways opened before or after the pens were broken the second time?
A. After the second time.
Q. Why were the gangways opened?
A. To throw the dead ones overboard.
Q. Who gave the order to throw the cattle overboard?
A. The captain.
Q. Do you remember how many cattle were thrown over this time?
A. No, sir.

Q. How many of the pens were broken the second time they broke?

A. About half of those aft on the port side.

Q. Were any of those amidships broken at this time?

A. No, sir.

Q. When you first threw the cattle overboard, did you take any of the cattle out of the unbroken pens?

A. No. The seas carried them.

Q. When the pens were broken the second time, was the steamer going ahead, or had she hove to?

A. She was going ahead.

Q. When the pens broke the second time, were any of the seas coming over the vessel from the port side?

A. Yes, sir; very heavy.

Q. How did you get the cattle overboard?

A. Opened the gangway, and fastened ropes onto those that were dead with which to haul them to the gangways.

23 Q. Were the ropes linked to tackle in the rigging, or were they just ropes which they used in their hands?

A. They were fastened to the donkey engine.

Q. Where was the donkey engine?

A. Just before hatch No. 4—between hatch No. 4 and the entrance of the engine-room.

Q. Were any of the live cattle thrown overboard at this time?

A. None; those that went over went of their own accord.

Q. How long were you engaged in throwing the cattle overboard?

A. A half an hour, because night was at hand.

Q. That was on the afternoon of the 31st?

A. Yes, sir.

Q. Was the vessel hove to while they were throwing the cattle overboard?

A. Yes, sir.

Q. When the vessel was hove to, were the seas directly ahead, or were they on one side of the vessel?

A. They were on one side, on the port side.

Q. Was the vessel rolling in the trough of the sea?

A. Yes, very much so.

Q. After you had thrown all the cattle overboard, were the pens left standing until you got to Liverpool?

A. Some of them; yes.

Q. Which ones?

A. (Indicating.) Some on the starboard side.

Q. Were any of those on the port side left standing?

A. Yes, opposite to No. 5 hatch.

Q. Any of those amidships left standing?

A. None.

Q. Did you take any of the cattle out of the pens on the starboard side?

A. There wasn't any there, because they had all been carried overboard on the 1st of November.

Q. Were all the cattle from the starboard side washed overboard by the seas?

A. All of them from No. 2 hatch aft, everything.

Q. On the starboard side?

A. On both sides.

Q. Didn't you have to drag them out of the pens in order that they might get washed overboard?

A. We broke one pen in order to drag out some that were
24 dead. The dead cattle were wedged between the boards, and we had to take a board out in order to drag them out.

Q. Were any of the cattle running about the deck at any time?

A. Several.

Q. On the afternoon of the 31st, were many of them running about the deck?

A. Many during the night.

Q. Did you tear up the floor at all while you were getting the cattle out?

A. On No. 3 hatch, because they were breaking the canvass and allowing leaks below.

Q. Any other place?

A. No.

Q. Were you on deck from the 31st?

A. Yes, sir.

Q. And on the 1st of November?

A. Also.

Q. Through what gangway was the man washed overboard?

A. No. 3 starboard.

Q. Where was he hauled on board the vessel again?

A. By the same gangway.

Q. How long was he overboard?

A. About fifteen minutes.

Q. Was this on the 31st or on the 1st of November?

A. The 1st of November.

Q. When did the seas begin to moderate?

A. On the night of the 1st. I went to bed then and went to sleep, and don't know much about it.

Q. What makes you remember that it was the 31st of October that the pens were broken?

A. Because I know that it was the last day of the month.

Q. Have you talked with any one about this since then?

A. We made a declaration in Liverpool; this is the second time; no other time.

Q. Did any of the live cattle jump overboard themselves?

A. Yes, sir.

Q. Did you have anything to do with the building of the pens before you left New York?

A. No.

Q. Did you see them while they were being built?

A. Yes.

Q. Did any of the cargo shift during the storm so as to make the vessel list to starboard?

A. No; it was the weight of the cattle that made the vessel list.

25 Q. The cattle, then, when the vessel listed, were most of them on the starboard side?

A. They were half dead on the starboard side?

Q. Were any sails set at all during the storm?

A. Yes; the mainsail and the foresail.

Q. Had you been on the *Hugo* before when she had cattle on board?

A. Yes, sir.

Q. How many cattle did she carry?

A. About 175 on deck; sometimes we carried them in between decks.

Q. Has she carried any cattle since this voyage?

A. No.

Q. Has she carried cattle before in the months of October and November?

A. We carried them several times, but I don't remember the months.

Redirect examination by Mr. CROMWELL:

Q. You had nothing in particular to make you remember the days of the month, did you, on which these events took place?

A. Only the calendar. I had a calendar in my cabin.

Q. Well, how long did the storm last?

A. I don't remember.

Q. There were two days, were there not, when it was rolling very badly?

A. On the 31st all day, and on the night of the 31st, and all day on the 1st of November it was very bad.

Q. All day the 31st, and nearly all day the 1st of November?

A. On the night of the 31st, and all of the 1st of November.

Q. You didn't sleep all one night, I understand you to say?

A. Not at all.

Q. You were pretty tired?

A. Very tired.

Q. Are you sure that the storm didn't begin on the 30th?

A. The wind commenced to freshen on the 29th and 30th, but the strength of the storm was from the 31st and the 30th.

Q. Didn't some of the cattle pens on the port side break on the afternoon of the 30th?

Mr. Parkin objects.

26 A. No; not on the 30th; on the 31st. The cattle that we attended to and made fast, it was the business of the cattlemen to do it, and we claim the wages for having performed the duties of the cattlemen during that time.

By Mr. PARKIN:

Q. Do you know when the cattle were fed the last time before the 1st of November?

A. After the houses were repaired they were fed.

By Mr. CROMWELL:

Q. By whom were they fed?
A. I don't remember; by all.
Q. By the cattlemen?
A. By the sailors.
Q. Not by the cattlemen?
A. No; only by the sailors and the firemen; seamen only.
Q. Was it your duty to attend to the feeding of the cattle?
A. No, sir.
Q. Why didn't the cattlemen attend to it?
A. I don't know; but they never appeared, and it was for this very work that I ask to be compensated.

PEDRO MALES ECHEVARRIA, being duly sworn and examined through an interpreter as a witness for the respondent, testifies:

By Mr. CROMWELL:

Q. What is your occupation?
A. Carpenter.
Q. Ship carpenter?
A. Yes, sir.
Q. With what vessel are you now connected?
A. With the steamship *Hugo*.
Q. Were you connected with her in October last?
A. Yes, sir; when she carried cattle.
Q. Were you carpenter then?
A. Yes, sir.
Q. Where was the *Hugo* in the latter part of October last?
A. She was at sea, after leaving here.
Q. She was in New York, was she not?
A. Yes.
Q. To what port was she going?
A. Liverpool.
Q. From New York?
A. From New York.
Q. Was part of her cargo cattle?
A. Yes.
27 Q. Where were the cattle stowed?
A. On the deck.
Q. Do the red lines on this diagram which I now show you show where the stalls in which the cattle were were located?
A. Yes; These are the houses, and this is the alleyway between. (Indicating the red lines and the part marked "alleyway" on Claimants' Exhibit 1.)
Q. What sort of weather did you have on starting out from New York?
A. We had good weather up to the 30th of October, when bad weather commenced.

Q. What was the condition of the sea and the wind on the 30th of October?

A. There was a good deal of wind, but not a very heavy sea as yet.

Q. Was there afterwards a storm?

A. Yes, sir.

Q. From which direction did the wind come?

A. I don't know exactly; it was somewheres on the port side when we were on the way.

Q. What effect did it have upon the *Hugo* on the 30th?

A. The weather was not very bad on the 30th nor the sea was not very high as yet.

Q. How was it in the afternoon of the 30th?

A. Considerably freshened up.

Q. Did it have any effect upon the cattle or the cattle stalls?

A. Very little on the 30th, but on the 31st it done quite a good deal of damage.

Q. How was the wind and sea on the 31st?

A. Quite bad.

Q. How did it affect the steamer?

A. Many of the stalls on the port side were broken by the seas.

Q. At what time of day was this?

A. Can't say definitely.

Q. What was done after the stalls broke?

A. We repaired the houses as well as we could, and then we took the oxen that were loose and put them back in their places.

Q. Which stalls were broken?

A. On the port side towards the stern.

Q. How with reference to No. 4 hatch?

A. Opposite hatch No. 4 on the port side.

28 Q. At what time of day on October 31st was this done?

A. I am not positively sure, but somewheres in the neighborhood of five o'clock in the afternoon.

Q. Was the *Hugo* going ahead while these repairs were being made or was she hove to?

A. While we were repairing, the vessel was hove to.

Q. How was the wind and sea at that time?

A. Much stronger yet.

Q. After the repairs had been made did the vessel proceed on her way?

A. She got under way and that afternoon also, we opened the gangways opposite the house and the one No. 4.

Q. Did the stalls remain fixed?

A. They remained in good order until they were broken again some time after.

Q. When did they break again?

A. Those and a great many others were broken again during the night.

Q. And what broke them?

A. The breaking of the seas.

Q. Did the seas break on board the steamer?

A. They broke frequently on board, the deck was continually overflown.

Q. From which side did the water come for the most part?

A. Mainly from the port side, and from the starboard side with the workings of the vessel (rolling his hands from side to side to indicate the rolling of the vessel).

Q. From which side did the wind come?

A. Port.

Q. And the waves were coming from that side?

A. Yes.

Q. And did they at times roll over the port side of the vessel?

A. Yes, and one of the boys that were working alongside me was carried overboard by one of them.

Q. Was that on this day or the following day?

A. That was on the 1st of November.

Q. What effect did the working of the seas over the vessel have upon the cattle and the cattle pens?

A. It would break the houses and throw the oxen all around, killing some and injuring others.

29 Q. Did it wash any overboard?

A. Yes, some that were injured were carried overboard.

Q. When was it that it first began to raise such havoc with the cattle and the cattle pens?

A. There was a trifling damage done before but the main damage was done on the 31st; some boards were loosened that I do not take any account of.

Q. Some boards were loosened and slight damage done before this?

A. Yes, and once in a while I would nail some of them back in their places.

Q. Was this the effect of the heavy seas?

A. Yes, sir.

Q. When did such slight damage as you have just described begin to be done?

A. It commenced on the 30th.

Q. Did you see what effect the heavy weather was having upon the cattle in the forward part of the ship on the 31st?

A. Do you mean when the ship was laying to?

Q. I said on the 31st.

A. It caused some damage, breaking away some of the boards.

Q. When was the vessel hove to?

A. On the night of the 31st, I can't tell exactly what time.

Q. When were the gangways opened, do you remember?

A. On the 31st.

Q. Which gangways were opened then?

A. The two on each side of the vessel opposite the houses and the one opposite No. 4 hatch.

Q. Was the gangway opposite No 3 hatch open?

A. Not until the next day in the morning.

Q. What was the condition of the pens and the cattle on the morning of November 1st?

A. The greater portion were dead and wounded, piled up on the starboard side, and when the gangway was opened a great many were washed overboard.

Q. How was the wind and sea that morning, November 1st?

A. A thousand times worse that the day before.

Q. How had it been during the night before?

A. Very bad.

30 Q. Had you been able to sleep?

A. No, I did not sleep. I was all night in the pilot-house.

Q. Did you have breakfast the next morning as usual?

A. No, sir; we did not get breakfast until after eleven o'clock.

Q. Why not?

A. We could not on account of the weather.

Q. Will you describe as fully as you can the condition of the pens and the cattle on the morning of November 1st when you first saw them?

A. Everything was broken and destroyed with the exception of a few houses on the forward part of the vessel. Everything was destroyed in pieces from about here (indicating No. 2 hatch) aft, from about No. 2 and No. 3 forward.

Q. Describe the condition of the cattle more fully.

A. Some were laying on their sides, others were dead and others were wounded.

Q. How wounded?

A. Some had their horns broken and others were bruised by the general shaking up that they had had with the tossing back and forth of the waves.

Q. Was it after this that No. 3 hatch was opened?

A. It was after this that gangway No. 3 was opened and after that we went to breakfast.

Q. What effect did the opening of the hatch have in respect to clearing the decks forward?

A. The effect was to clear the decks somewhat and the saving of our lives.

Q. Did you consider it dangerous to your lives to be down there where the cattle were?

A. I have never seen anything worse before.

Q. Was it to let this wreckage overboard that the gangway was opened?

A. They were opened in order to give an outlet for the seas that were coming, so that they could carry away whatever was loose.

Q. The seas were dashing over the sides that morning, were they?

A. Yes, sir; they were coming continually on deck.

31 Q. How was it with the cattle and the pens aft on the morning of November 1st?

A. The houses aft were also all broken on the morning of the 1st.

Q. How about the cattle?

A. Some of them were going around loose, others were fastened together with pieces of the boards and generally knocked about the deck.

Q. How long did this bad weather continue?

A. Two days; I can't say exactly, but about two days.
Q. How long have you been on the *Hugo?*
A. Two years and three months.
Q. Have you been on voyages before where cattle were carried?
A. Yes, sir.
Q. Before the *Hugo?*
A. Two or three times before when she carried cattle.
Q. From your experience on steamers carrying cattle, do you think that the cattle that were loose in this way could have lived through the voyage?

Mr. Parkin objects.

A. They could not have lived because they were all destroyed.

Cross-examination by Mr. PARKIN:

Q. Did you build the pens on board the *Hugo?*
A. It was the shore carpenter that attended to that part of the work.
Q. On what day were the pens first broken?
A. Late in the afternoon of the 31st; I don't know the hour exactly.
Q. Didn't you say that some damage was done to them on the 30th?
A. Yes, a few boards were loose, but nothing of any account.
Q. What boards were they which were loosened?
A. On the port side below the rail.
Q. Were these boards in front of the cattle or behind the cattle?
A. Behind.
Q. How were they broken?
A. Simply loosened, required to have a nail or two driven in.
A. What broke them?
Q. They were loosened when the seas commenced to come on board.
32 Q. Were any of the cattle injured on that day by the seas?
A. No, sir.
Q. As I understand, the first time they were badly broken was on the afternoon of the 31st?
A. On the afternoon of the 31st.
Q. Now what part of the pens were broken at that time?
A. On the port side some of the side boards and some of the dividing boards.
Q. By the side boards do you mean the boards in front of the cattle?
A. On both sides.
Q. Were they the boards running along the alleyway in front of the cattle, or were they the boards that were placed against the rail that were broken?
A. Those that were along the rail and those that were in front of the cattle and some of the uprights.
Q. Did the seas break over the pens at that time?
A. Yes, sir; that is the way they broke the houses.

Q. Was the vessel going at this time or was she hove to?
A. It was then that the ship was stopped in order to repair the houses.
Q. But when the houses were broken the ship was going forward?
A. Yes, sir.
Q. Was the sea quite heavy at this time?
A. Yes, sir; very much so.
Q. Did the vessel roll a good deal?
A. Yes, sir.
Q. Were the pens on the starboard side broken at all on the 31st?
A. In the afternoon of the 31st they were still in good condition.
Q. In order to open the gangway No. 4 did you remove some of the pens?
A. I believe so, but I am not sure.
Q. How many of the cattle were thrown overboard on the 31st?
A. I don't know.
Q. Were any of the cattle running about the deck loose on that afternoon?
A. We drove them towards the stern and kept them there until we repaired the houses, when we put them back into their places again.
Q. That was on the afternoon of the 31st?
A. That was on the afternoon of the 31st.
33 Q. You put them back in their houses on the port side?
A. On the port side where they were before.
Q. Who was the man that was washed overboard?
A. One of the sailors, a young man.
Q. Is he on the *Hugo* now?
A. Yes, sir.

Redirect examination by Mr. CROMWELL:

Q. How many days after the afternoon when you repaired the pens on the port side and put the cattle back again, how many days after that did the storm rage?
A. I can't say for certain; the weight of the storm was on the 31st of October and on the 1st of November.
Q. And from your reference to those two days, or this time when you repaired the pens and put the cattle back—was it on one of those two days or was it the day before?
A. I repaired the houses on the afternoon of the 31st.

JULIAN ORMAECHEA, being duly sworn and examined through an interpreter as a witness for the respondent, testifies:

By Mr. CROMWELL:

Q. What is your occupation?
A. First officer.
Q. First officer of what vessel?
A. Of the *Hugo*.
Q. How long have you been first officer of the *Hugo*?

A. Four years.
Q. In what class of vessels did you sail before the *Hugo*?
A. The steamer *Frederick* and the *Manuela* of the same line.
Q. As first officer?
A. Second.
Q. How long have you followed the sea?
A. Thirteen or fourteen years.
Q. In what class of vessels?
A. On the *Hugo* four years as first officer, and five years as second officer; in the *Frederick* two years as second officer, and on the *Manuela* two years and a half as second officer.

34 Q. What before that?
A. Before that I was apprentice on sailing vessels.

Q. Were you connected with the *Hugo* as first officer in October last?
A. Yes, sir.
Q. Was the *Hugo* in New York during that month?
A. She was here.
Q. When did she sail from New York?
A. I am not certain about the date; somewheres about the 23d or 24th.
Q. Where was she bound?
A. For Liverpool.
Q. What cargo did she carry?
A. A general cargo.
Q. Did she carry a deck cargo also?
A. Yes, sir.
Q. What was that deck cargo?
A. 165 oxen.
Q. On what deck were they stowed?
A. On the forward and aft decks.
Q. Main deck?
A. Main deck forward and aft.
Q. Do the red lines on this diagram that I show you truthfully represent the way in which the cattle pens were arranged?
A. Yes, sir.
Q. There were cattle, then, stowed along each side against the bulwarks forward of the deck-house and along the bulwarks aft of deck-house, and also on the hatches Nos. 2 and 3, and also back of the deck-house on hatch No. 4, and back to hatch No. 5?
A. All over except on hatch No. 5, in which there was feed.
Q. And there were alleyways between the cattle stowed along the side and those on the hatches?
A Yes, sir.
Q. What sort of weather did you have during the early part of your voyage after starting from New York?
A. The first few days we had medium fair weather. After the 29th the weather began to freshen.
Q. From which direction was the wind?
A. From the fourth quadrant, that is, between the north and the northwest.

Q. How was the sea?

A. I do not remember exactly how the sea was on the 29th.

Q. On which side of the vessel did the wind come?

A. On what day?

35 Q. On the 29th.

A. On the port side, from the north to the northwest.

Q. How was the wind and the sea on the 30th, the next day?

A. On the 30th up to noon the wind was very fresh, and the sea was lively from the north and northwest. In the afternoon some of the houses were broken on the port side opposite hatches Nos. 3 and 4.

Q. How were these pens broken?

A. By the weights of the seas breaking onto the deck.

Q. Did seas break over the side of the vessel?

A. They would break over on the sides.

Q. Had they increased since morning?

A. They were increasing all the morning, till the afternoon.

Q. At about what time was this damage done in the afternoon?

A. About five o'clock in the afternoon the houses were broken, and that was also the time when the engine was stopped so as to repair them.

Q. The *Hugo* was hove to while these repairs were made?

A. Yes, sir.

Q. How long did it take to make these repairs?

A. About an hour.

Q. How long did the steamer remain hove to?

A. Between five and six o'clock on the 30th.

Q. After the repairs had been made, did the vessel proceed on her way?

A. Yes, sir, she got under way again after the oxen had been put in their places again. But shortly after, the heavy seas that would break over the deck again broke some of the houses, and the cattle that were in them remained in the alleyways towards the stern of the vessel, and some went over hatch No. 5.

Q. Describe fully all that occurred that afternoon and evening.

A. After that night, the weather was getting worse both in the wind and the sea, and in that way we passed the night, the wind and the seas increasing in force. On the following morning, the 31st, the weather was very hard, and the seas very heavy, breaking against the vessel and breaking all over, the vessel rolling very much. About nine o'clock in the morning of the 31st we stopped the engine so as to be able to feed the oxen, and we fed all

36 of them, using all of the deck watch for the purpose and some of the cattlemen that were also there.

Q. How many of the cattlemen were there?

A. I do not remember how many were there.

Q. One or two or five, or how many?

A. There might have been three. After that time, up to the 2d after ten o'clock, I saw none of them. After having fed the cattle, we started the engine, and we continued sailing on our course.

Q. The members of the crew then, I understand you, attended to the feeding of the cattle that morning?

A. Yes, sir; from the tops of the houses they were all fed, because by reason of the seas that would break over, it was impossible to feed them otherwise. About noontime the weather was very bad and the seas increasing in force; during the afternoon many of the houses on the port side were broken.

Q. How were they broken?

A. By the weight of the seas that came over the sides.

Q. What had been done with the cattle that had broken out from their pens the evening before? What had become of them?

A. They passed the night in the passageways between the houses, and on the following morning when the vessel was stopped, and the houses were repaired, they were put back into their places.

Q. This was the morning of the 31st?

A. Yes. With the exception of one that lay on No. 5 hatch, which was nearly dead and could not be got up.

Q. What had injured this animal on No. 5 hatch?

A. It was between the donkey engine and the passageway, and by being jammed from one side to the other during the night, it was so injured that it could not move.

Q. What jammed it?

A. The tremendous rolling of the ship.

Q. Now, to come back to the afternoon of the 31st. Tell us fully now what occurred from that time on.

A. On the 31st, in the afternoon, at about five o'clock in the afternoon, seeing that the weather was getting worse, and the
37 waves and seas breaking and crashing against the sides, and came on board, filling all the houses with water, and the vessel rolling very heavily, we determined to stop the engine and come to.

Q. Are you sure just what time you stopped the engine?

A. I can't saw exactly, but it must have been between five and six, or from four to five.

Q. It was during the afternoon you mean?

A. On the afternoon of the 31st.

Q. But you are not sure of the hour, are you?

A. No, I am not sure; it is a year since then, and my memory doesn't help.

Q. What was the condition of the stalls and the cattle at the time that the engine stopped?

A. Those on the port side were in pretty bad condition from hatch No. 4 aft, and some of the boards of the houses on the starboard side had also been carried away by the seas.

Q. In what way had the cattle suffered damage?

A. By reason of the rolling of the vessel and the seas that continually struck it.

Q. What damage, if any, had been done to the cattle?

A. At that time, the 31st, in the afternoon, they were not in a very bad state. Some of them had already lain down.

Q. Did the storm seem to be increasing?

A. Yes, sir.

Q. Why was the vessel hove to that afternoon?

A. So that the cattle should not suffer so much.

Q. What effect did the heaving to of the vessel have? Did it diminish the effect that the wind and waves were having on the vessel?

A. It did not diminish the weight of the seas, because they were increasing in force.

Q. The seas themselves were increasing in force?

A. The seas themselves were increasing.

Q. Did they still break over the vessel?

A. They continued to break.

Q. If the steamer had continued on her course, would the situation of affairs have been better or worse, in your judgment?

A. In that case, everything that we had on deck would have been carried over.

38 Q. Was the destructive force of the wind and seas diminished then by heaving her to, do you think?

A. No, we could not diminish the effect of the wind and seas, because both were increasing in force.

Q. How did the weather continue on the evening of the 31st?

A. During the night it was a hurricane.

Q. Did you open any of the gangways?

A. Yes, sir.

Q. When was that done?

A. In the afternoon of the 31st.

Q. Why was it done?

A. So that in case the sea should be worse, the decks would be free to carry over the cattle. About five o'clock we opened the gangways on each side of the vessel opposite the houses, and the one opposite the No. 4 hatch, and they were so opened, so that if the weather should become worse, there would be an opening for the oxen to go out.

Q. The weather did become worse, didn't it?

A. The weather in the afternoon of the 31st was very bad, and became a hurricane.

Q. Did you sleep that night?

A. Between eight and ten o'clock.

Q. How was the storm during the night?

A. It was a hurricane.

Q. Were any of the cattle and fragments of the cattle-houses washed overboard during that night, do you know?

A. On the following morning, that is the 1st of November, when it was daylight, the whole after part of the deck was a scene of destruction.

Q. How was it with the cattle that were forward of the deck-house?

A. Those houses that were opposite No. 3 hatch were in the same condition of the after houses, and the oxen that had been in them had passed to the alleyways between. Most likely during the night some of them were carried away overboard.

Q. Were they able to stand up?

A. No, sir; they all of them were down, and some of them with broken legs.

Q. Otherwise injured?

A. During the night they suffered very much; they were continually thrown from one side to the other.

Q. Was the crew up all night?

39 A. After four o'clock in the morning, they were all on the bridge on the top of the house.

Q. Were they able to have breakfast at the usual time the next morning?

A. Not on the first, no, sir.

Q. What was the reason?

A. Because on that day nobody thought about eating.

Q. Why not?

A. If a file of soldiers were put before you with their muskets pointed at you, would you feel like eating? With an out-and-out hurricane in the morning, all the after deck a complete scene of destruction, all the oxen thrown from port to starboard side, back and forth, such of the pens as remained standing had only the roofs, and the side boards had been carried away and broken, all the flooring boards to which the houses had been made fast were loose; during the night all that had been opposite No. 4 hatch had been carried away, and you would find the cattle, some with legs broken and others dead, and in view of all this, would you feel like eating breakfast?

Q. Well, what was done that morning, in view of all this?

A. In the morning, it was determined to throw overboard all that were dead and those that were badly injured, by using ropes in connection with the donkey engine. A man could stand by the donkey engine, that is to pull and let go, by reason of being protected by the entrance of the engine-room, and notwithstanding how many seas might break over and come in, he was safe. But the man that had to fasten the end of the rope to the ox that was then dead or injured, had to wait for an opportunity to make fast, and immediately climb onto the bridge. They were in that way pulled towards the No. 4 gangway, and with the heavy rolling, they would roll over and be carried away by the same wave.

Q. Had the cattlemen been on deck during the storm?

A. No, sir; from the time that the cattle were last fed, which was on the morning of the 31st, was the last that I saw of them on deck.

Q. Where were they?

A. I do not know where they were; they were, I suppose, in their rooms.

40 Q. Why weren't they on deck?

A. I do not know; they may know themselves.

Q. Did the weather continue bad during the whole of the first?

A. No, sir; towards the afternoon we could tell that the wind was diminishing in force, but the seas continued just as heavy.

Q. When were the decks cleared of the wreckage?

A. On the 1st of November, toward noontime.

Q. Have you travelled on voyages where cattle were carried in this way, before this particular voyage?

A. Very many times, both on the *Hugo* and on the *Frederick*.

Q. In your opinion, could the cattle that were lost in this way have been saved, even if the weather had moderated?

A. I don't know; they might have lived or they might not have lived. One of them that remained injured and wounded on board died in two or three days, and the same might have happened with the others.

Q. What is your judgment about it?

Mr. Parkin objects.

A. My opinion is, that after having suffered so much, I do not think they could have lived.

Q. How many cattle were saved?

A. 38.

Q. Where were they stowed?

A. From No. 3 forward (indicating on the diagram between No. 2 and No. 3 hatch).

Q. How do you account for their being saved?

A. Because they were towards the bow of the vessel, which is a point where they suffer the least.

Q. Is there a turtle-back over the bow of the *Hugo?*

A. Yes, sir.

Q. Does that tend to diminish the effect of the storm there?

A. Yes, it protects them the same as in all vessels with turtle-back, which protects that portion of the bow.

Cross-examination by Mr. PARKIN:

Q. You keep the log on board the *Hugo?*

A. Yes, sir, by order of the captain.

41 Q. Did any seas come on board the *Hugo* on the port side on the afternoon of the 30th?

A. Yes, sir, and several of the houses were broken.

Q. And those were afterward mended, as I understand?

A. Yes; they were afterwards repaired.

Q. And the pens you say were broken again on the 31st?

A. They were broken again on the same afternoon, on the 30th, and the oxen that were in them remained in the passageways.

Q. Did the oxen remain in the alleyways during the night of the 30th?

A. Yes, sir; on the night of the 30th they remained in the alley-way-, and on the following day they were placed back into their places again, because the cattlemen refused to feed any of the others, because these were in the alleyways.

Q. They remained in the pens, then, until the afternoon of the 31st, as I understand?

A. Up to the afternoon of the 31st at five o'clock, after we had done whatever repairs we could, nailing such boards as had become

loose and placed them back in the places so that they could stand the heavy rolling of the ship, and they remained there until the afternoon.

Q. The vessel kept on her course during the 31st until the afternoon, did she?

A. After having fed the cattle, the vessel went on her way up to five o'clock in the afternoon, when, seeing that the weather was becoming worse and that there was no way of improving the situation, it was then that we stopped the engine, and the vessel remained crosswise to the wind and to the seas.

Q. Were the pens broken again on the afternoon of the 31st, before the vessel stopped?

A. Yes, sir.

Q. And you didn't mend them again at all?

A. No, sir.

Q. How many of the pens were broken that afternoon?

A. All were more or less damaged.

Q. All on both sides of the vessel or on the port side?

A. Those on the bow were all right, but, beginning with those opposite No. 3 hatch aft, all were more or less damaged.

42 Q. Where were the cattle during the night of the 31st, after the pens were broken?

A. They were on deck from the port to starboard, with the boards loose and some of them hanging from their heads, still attached to their ropes.

Q. Were the pens on the starboard side aft broken on the afternoon of the 31st?

A. They were entirely broken during the night.

Q. How did the vessel head after she stopped?

A. She was crossways to the wind and seas, with the bow pointing approximately to the east-southeast.

Q. So that the wind and seas were on the port side of her?

A. On the port side of her.

Q. Directly abeam?

A. No, sir, because the seas were running in three different directions. Sometimes we had the seas from the north and sometimes from the northwest and from the northeast. In three or four directions.

Q. Did the vessel roll a good deal?

A. Very much.

Q. Did any of the cattle go overboard on the 31st?

A. On the 31st, when the gangway No. 4 was opened, those that were loose went overboard of their own accord. There was about nine, and the one that had laid on the No. 5 hatch, being nearly dead and with his tongue sticking out, was the only one we threw overboard.

Q. How many went over that afternoon?

A. Nine, and this one that we threw over, ten.

Q. What cargo did the *Hugo* have on board?

A. General cargo.

Q. Grain, cotton, general cargo?

A. Yes, sir, general cargo.
Q. Do you know how much she carried—how many tons measurement?
A. I don't know exactly; no.
Q. Can you tell approximately?
A. Over 2,000 tons.
Q. Do you know how much water she drew when she left New York?
A. With a few inches more or less, 22½ feet.
Q. What is her length?
A. 375 feet, as I hear. I do not know positively.
43 Q. What is her beam?
A. I don't know; it is 35 to 36 feet.
Q. Do you know her registered tonnage?
A. 1,772.
Q. Is the upper deck a flush deck all the way from the bow to the stern?
A. It is all flush, but her deck-house is on it.
Q. Do you know how much freeboard she had on this voyage?
—. I do not remember; about seven feet.

José Ramon Enchortiata, being duly sworn and examined through an interpreter, as a witness for the respondent, testifies:

By Mr. Cromwell:

Q. What is your occupation?
A. Boy.
Q. You are apprentice on the *Hugo?*
A. Yes, sir.
Q. Were you connected with the *Hugo* in October last?
A. Yes, sir.
Q. On her voyage from New York to Liverpool?
A. Yes.
Q. Did you encounter heavy weather during that voyage?
A. Yes, sir.
Q. Do you remember the first day of November? Did that come during that voyage?
A. Yes, sir.
Q. What were you doing on the morning of that day?
A. I was throwing overboard the lumber that was breaking the canvas on the top of the hatchways.
Q. What was this lumber?
A. The pine lumber from the broken houses.
Q. Cattle-houses?
A. Yes, from the cattle-houses.
Q. Did anything particular occur to you that morning?
A. No, sir; only that I was bleeding at the ears when I was taken out of the water.
Q. How did you get in the water?
A. I was in suspense and I was taken by a wave and carried over with some of the oxen.

44 Q. Where did this wave come from?
A. From the port side.
Q. Over the vessel?
A. Yes, sir.
Q. Did it hit you?
A. It carried me over.
Q. Into the sea?
A. Yes, sir.
Q. How did you get back on the vessel?
A. The captain was on the bridge and he threw me the life-preserver; I got hold of it and some time afterwards the boatswain and some of the other sailors threw me some ropes with which they hauled me on board.
Q. Was anything else washed overboard with you at that time?
A. It carried a lot of cattle with it at the same time.

Cross-examination by Mr. PARKIN:

Q. How old are you?
A. I was eighteen on the 2d of June.
Q. Where were you standing when the wave washed you overboard?
A. I was not standing, I was throwing lumber over.
Q. Were you on the deck?
A. Yes, sir; on top of the hatchway No. 3.
Q. How long had you been there when the wave took you overboard?
A. A very little while, because when the waves came I got on the bridge, and at one time, one caught me in suspense and carried me over. I did not see it coming.
Q. What time of the day was it when this happened?
A. I cannot say; it was some time in the morning, but I had no opportunity of going to look at the clock.
Q. Were you helping the men get the cattle overboard?
A. Yes, sir.
Q. How were they getting the cattle overboard?
A. We brought two or three to the gangway, and the waves would carry them over.
Q. Were the cattle standing on the deck?
A. No, sir; they went on the rollings from one side to the other.
Q. How did they get them to the gangway?
A. With a rope.
45 Q. Were any of the cattle standing up on any part of the deck?
A. Yes, sir, there were some towards the bow of the vessel.
Q. How long were you in the water?
A. Not very long, only a little while.
Q. Were you on board the *Hugo* last night?
A. Yes.
Q. Did you see the captain or the first officer last night?
A. Yes, sir.

Q. Did he tell you that you were to come here today and give your testimony?

A. Yes, sir.

Q. Did he tell you what you were to say?

A. No, sir.

Q. Were you on deck on the 31st at all?

A. Yes, sir.

Q. Did you help put any of the cattle overboard on that day?

A. Yes, sir.

Q. How did they put the cattle over that day?

A. We brought them to the gangway, but on the following day a great many others went also.

Q. Who told you to throw the lumber overboard?

A. Nobody; we were all doing all that we could independently to save.

Q. Which hatch was it that the lumber was injuring?

A. No. 3.

Q. Had that hatch been covered by planking before you began to throw the boards over?

A. Yes, sir.

Q. Some of the cattle stood on No. 3, did they not?

A. Yes, sir.

Q. Did you tear up the planking from the hatch?

A. No, sir, the waves carried it; all the houses that were there were carried by the seas.

Q. Was the planking on this hatch nailed down to the hatch before the seas carried it away?

A. No, sir.

Q. Was the planking in any of the other stalls nailed down to the deck?

A. Not to the deck.

Q. It was only laid on the deck?

A. They placed them on the deck and then the cleats were nailed on the top.

46 Q. Point out on this diagram which I show you just where we were standing when the wave took you overboard.

A. How am I going to tell you anything about it if I do not know what the plan is? I do not understand the plan.

Q. This is the plan of the deck of the *Hugo*. No. 3 is hatch No. 3. The red lines represent the cattle pens. The part marked "gangway opened" is where the gangway was. The part marked "deck-house" is the deck-house of the *Hugo*. The upper end of the paper is the bow of the vessel. Can you now point out where you were standing?

A. Yes, sir (indicating by a black pencil cross on hatch No. 3 the place where he was standing).

Q. How far away from the vessel did the wave carry you?

A. Two or three fathoms.

Q. Did you swim back towards the vessel?

A. How could I swim when I was burdened with rubber boots and oil clothes? The vessel came towards me.

Q. Where did they haul you on board again?
A. Right by the stairs going to the bridge.
Q. Between gangway opposite hatch No. 3 and gangway opposite the deck-house?
A. Yes, sir.
Q. Where were the men standing who hauled you on board?
A. On the rail.
Q. Who threw the life-preserver to you?
A. The captain.
Q. Where was he standing?
A. On the bridge.

Redirect examination by Mr. CROMWELL:

Q. The vessel was hove to at the time that you were washed overboard, wasn't it?
A. Yes, sir; the wind carried it somewhat back.
Q. Were the men that threw you the rope and hauled you on board again standing on the rail, or do you mean that they were standing behind the rail, between the rail and the deck-house?
A. On the rails themselves.
Q. Had they climbed up on the top of the rail?
A. Yes.
Q. Where was the mainmast on the steamer?
47 A. Haven't you said that this is the deck-house (indicating deck-house on diagram)? Well, it is in the centre of the deck-house.
Q. Were there shrouds running down from the masts to the rail?
A. Yes, sir.
Q. Was it there that the men were standing when they threw the ropes to you and hauled you on board?
A. Yes, sir.
Q. And were they holding on to these shrouds?
A. Yes, sir.

JOSE ANTONIO GARTIEZ, being duly sworn and examined through an interpreter as a witness for the respondents, testifies:

By Mr. CROMWELL:

Q. You are the master of the *Hugo*?
A. Yes, sir.
Q. How long have you followed the sea?
A. Nineteen years.
Q. In what class of vessels?
A. Two years in a sailing ship, the first two years; after that steamers.
Q. In what capacities?
A. First, apprentice in a schooner, after that second mate in a steamer, after that chief mate, after that captain.
Q. How long have you been a captain?
A. Nine years.

Q. What papers do you hold?
A. The certificates proper from the Spanish government, as any other captain.
Q. Have you had experience as master of vessels carrying cattle?
A. Yes, sir.
Q. How long?
A. I have carried cattle about thirteen years.
Q. How long have you been master of the *Hugo?*
A. The *Hugo*, the past two years and a half.
Q. What kind of a vessel is the *Hugo?*
A. Fine ship.
Q. Iron ship?
A. Iron ship.
Q. When was she built, do you know?
A. In 1873.
48 Q. What is her present condition?
A. Good condition.
Q. What was it in October last?
A. Very good; fine.
Q. How long is she?
A. I think she is three hundred and seventy-five feet long.
Q. How wide?
A. Thirty-six feet, I think; I am not sure, though.
Q. But about that?
A. About; yes, sir.
Q. How deep?
A. Thirty to thirty-two feet.
Q. How many decks has she?
A. Three decks.
Q. How many hatches?
A. Five hatches—hatches for cargo is five; one, a small one forward, for stores.
Q. You were master of her in October last, were you not?
A. Yes, sir.
Q. Was she in New York during that month?
A. New York.
Q. When did she sail from New York?
A. 24th of October.
Q. Bound for where?
A. Liverpool.
Q. What was her cargo?
A. General cargo.
Q. Did she also carry cattle this voyage?
A. Yes, sir.
Q. How many, do you remember?
A. 165.
Q. Where were they stored?
A. On the deck.
Q. Which deck?
A. The top deck.
Q. Does this diagram, which I show you, represent the deck plan

of the deck on which the cattle were stowed, and do these red lines indicate the cattle stalls?

A. Yes, sir; but in all of this part (indicating the red line around No. 4 hatch and extending back to No. 5, and the midship pens forward) they were not full.

Q. Not full of cattle?

A. Not full of cattle.

Q. About how many were in there, do you know?

A. There wasn't all houses there; the houses were made for such oxen as were carried there. There were no oxen in hatch No. 2 or forward of the line which I draw in black pencil in the pens amidship, nor were there any cattle aft of the black pencil mark which I draw across the pens amidships aft.

49 Q. Aside from the parts of these midship pens which you have excluded, were the remaining parts of the pens full of cattle?

A. Yes, sir; and the remaining space was left to put in barrels and to give them their water and feed and so on.

Q. Did you have cattlemen on board also to attend to the cattle?

A. There were cattlemen on board.

Q. And it was their duty to attend to the feeding and to take general care of the cattle, was it?

A. Yes, sir.

Q. When did you sail from New York?

A. About the 24th.

Q. What was the weather during the early days of the voyage? Describe fully the first days of the voyage up to the beginning of the storm.

A. We had medium weather such as we usually have in the fall.

Q. Did anything of special interest occur up to, say, the 29th or 30th of October?

A. No, sir.

Q. How had the winds been up to the 30th?

A. Variable, little wind and variable.

Q. How had the sea been?

A. For the first few days after leaving here the sea was calm, but on the last few days towards the 30th the sea was becoming more agitated from the west and from the south.

Q. When did the weather begin to get more stormy?

A. Fresh it commenced on the 30th; on the 31st fresher; on the night of the 31st a hurricane, and at daylight on the 1st a tremendous hurricane.

Q. On the 30th in which direction was the wind?

A. About northwest; I don't know very well because I have not seen the book; north and west.

Q. Were the seas coming from that direction too?

A. Yes, and west and south a little bit.

Q. Beginning on the 30th, will you give us a full account of all the circumstances that occurred?

A. On the 30th fresh weather; and while we were going under steam on our course there were broken in the afternoon some houses

on hatchway No. 3, and opposite hatch No. 4 on the port side, alongside the hatch on the port side. Those opposite No. 3 were not so badly damaged, as those opposite No. 4 were broken teetolly.

50 Q. Did the cattle come out of the houses broken opposite No. 4?

A. Yes, they came out. When I saw the houses opposite No. 4 broken I stopped the engine, repaired the houses and placed the oxen back in them; but towards evening, after having again got under way, they were again broken, towards nightfall, and the cattle that were there came aft and located themselves in the passageways that were there and remained there all night.

Q. Why didn't you put them back in their stalls?

A. Because it was already night, and I could gather none of the boards, and it was impossible to fix the houses.

Q. How was it that night?

A. Very fresh winds, and the cattle thrown from one side to the other and hurt, one of them remaining here (indicating by a circle in black pencil on the starboard corner of hatch No. 5).

Q. How did that animal get hurt?

A. During the night. When they came out they went wherever they could and they were thrown from one side to the other. That one remained there because there is a small engine right there.

Q. Had it been bruised against this engine?

A. He was bruised by hitting against the little engine itself and the sides of the other houses and the hatchway itself.

Q. Were you able to proceed that night on your way?

A. Yes, sir; the steamer followed its course.

Q. How was the storm during the night?

A. Fresh, and the seas increasing.

Q. The next morning was the 31st. What occurred then?

A. On the night of the 30th I went to bed at one o'clock and got up between six and seven in the morning; I went to see to the cattle, as it is always my custom. First I went forward towards the bow and noticed the absence of some of the boards of the houses, but nothing very serious; I came aft to see to those that were aft, and I found here (pointing to the place where the injured ox was lying) one or two of the cattlemen where the injured ox was.

51 Q. What were they doing?

A. They were seeing to the ox and trying to raise him with the assistance of two or three of my sailors. I noticed that they had not fed nor given them water.

Q. Who, the cattlemen?

A. The cattlemen did not feed nor give water to the cattle; and I told the cattleman to leave that ox and to occupy himself in feeding and giving drink to the others. He told me——

Q. Who told you?

A. The foreman of the cattlemen. He told me that if I did not take away the cattle from the alleyways, those that had passed the night in the alleyways, that he would neither feed nor water the oxen. And so that he should feed them I replaced here (on the port side opposite hatch No. 4) a few boards, making up houses; but they

did not have any coverings nor they did not have any roof. I first nailed some cleats onto the deck so that they would not slip. Then when we brought the oxen here (indicating the same place) we commenced to feed and give water to them, the others.

Q. You and your men, or the cattlemen?

A. These two or three cattlemen and the greater portion of my crew occupied themselves in feeding and giving them water, putting the food through the tops of the houses and having it fall down below.

Q. How many of your men were there altogether?

A. Six.

Q. Where were the others?

A. I do not know; there was two or three there at the time.

Q. That was all?

A. That is all that I saw.

Q. Is it the duty of the cattlemen to attend to the feeding and giving water, do you know, to the cattle, or is it the duty of the crew of the steamer?

A. That is what they go for; the cattlemen are the ones that should attend to the cattle, and when they do not do so, and I see it, then I do it with my sailors.

Q. Did I understand you to say that the cattlemen had refused to attend to the cattle this morning?

A. I have said that they refused to feed and give drink to
52 the cattle until I should take those away and put them in this place, where I could see they would be in a very bad place.

Q. Those that were in the alleyways?

A. In the passageways. There wasn't any left, because I had already placed them in this place.

Q. Then you fed and watered them?

A. After having been placed there, then we fed and gave them water.

Q. What occurred after that?

A. After having fed them I put the vessel on her course again and got under way.

Q. About what time in the morning was this, do you remember?

A. It must have been between eight and nine when we stopped in order to make those arrangements.

Q. How long were you able to proceed on your course?

A. We continued up to the afternoon.

Q. What was the situation in the afternoon?

A. Bad all the time, and it was getting worse.

Q. Do you mean the wind and seas?

A. The seas were increasing and the wind very much increased. And on this same afternoon, when the seas again cleared off those cattle, I stopped the engine so that the waves would break no more. I stopped, but I noticed that I did not obtain much by doing so.

Q. What cattle pens were broken at the time that you stopped?

A. Those that were broken here that I had repaired before, and some on the starboard side, and some forward (indicating the port side).

Q. What became of the cattle that had been in those stalls?

A. Those that were in these houses (indicating) went wherever they could go; escaping, because the weather was getting worse and they could not remain there. Those cattle I tried to arrange for placing them in other houses, but it was not possible to do so, and they came through there wherever it was room and agglomerated themselves on the starboard side.

Q. About how was the wind at this time?

A. Very hard, and the seas very strong, and the oxen were already suffering a great deal.

53 Q. Did those cattle that had broken out from the pens on the port side do any damage to the other pens and the cattle on the starboard side and in the centre?

A. It was to be supposed so. The greater portion of them were all in a bunch on the starboard side.

Q. What was done then?

A. Then we waited some—stopped the engine; the weather was getting very bad, and the hurricane was almost declared.

Q. Were the cattle wounded in any way or injured?

A. I could not see how they were wounded, but they were damaged, and they would have been lost anyhow.

Q. What was the condition of affairs at that time forward?

A. On the port side they were suffering a good deal, and also on the starboard side when the vessel rolled and the water came in, and all commenced to suffer more or less.

Q. What do you mean by suffering?

A. They were injuring themselves—wounding themselves and killing themselves.

Q. What did you, during the afternoon of that day, to improve the situation?

A. Before nightfall I saw that I had to go through a tremendous hurricane, according to the indications of the barometer.

Q. How was the barometer acting?

A. Falling.

Q. Had you observed it frequently during the day?

A. I observed it two or three times in the book, but many times besides. I convinced myself that I had tremendous weather, and that I was to have a hurricane that night.

Q. And then you opened the gangway?

A. Towards nightfall I opened the gangway of No. 4 hatch.

Q. On the starboard side?

A. On the starboard side, and when it was opened some of the cattle went overboard. On that same night, or rather this same afternoon, I opened the gangways on the port and starboard side opposite the deck-house, because I supposed that in the horrible hurricane that we would have during the night the waves would break the cattle out of their places on the port and starboard bows and carry them down to the alleyways where there was no

54 resource for their safety. And as I thought, opening this during the night, without my seeing them, but as I had expected, the cattle washed down; the waves broke the houses and

washed them down. I do not know how many went over by those gangways during the night, neither do I know how many went over by gangway No. 4; what I saw was that in the morning when daylight appeared I saw from here to here (indicating the places where the stalls are on the starboard side)—I saw there from the bridge, looking over myself, that many of the cattle had their legs sticking out the sides of the vessel through the rail; some one leg, others two legs, and others with all four. This must have happened, without doubt, during the night. And on that night, as I saw the horrible hurricane, between ten and twelve o'clock—I don't remember the exact hour—opposite each one of the four masts of the vessel I placed oil bags in the water in order to calm down the waves.

Q. Over which side of the vessel was this done?

A. On the port side, to windward.

Q. Did you sleep that night?

A. No, sir.

Q. Describe the situation of affairs the next morning.

A. In the following morning, as I have said before, a great many of the cattle had their legs outside of the rail; the houses were broken—a few were not broken on the forward part of the ship; the cattle were all down, with the exception of those towards the bow, and some were dead, others broken, others with their horns broken off; some were on their backs, making a heap of cattle and boards all mixed in one. When I saw this condition of affairs, the first officer came to the bridge where I had been all night, and I asked him his advice as to what to do in this situation. He says to me, "The weather is too strong, the sea becomes more crested, the heavens still more threatening."

Q. How was the barometer?

A. I then went to see the barometer, and during that time it was falling very rapidly. I expected that the hurricane would come with still much greater force.

55 Q. Had waves been breaking over the vessel during this time?

A. The waves would break on the deck, over the bridge, over the houses that had already been broken, and there was water everywheres, and there we could see a calamity. The opinion of the first officer and my own opinion, after having looked at the weather and the barometer, was to determine to open gangway No. 3.

Q. About what time in the morning of November 1st was this?

A. About 6 or 7 o'clock—just about daylight.

Q. And you then opened gangway No. 3?

A. Gangway No. 3 was opened.

Q. Had you been able to have breakfast that morning?

A. No, sir.

Q. What was done after opening gangway No. 3?

A. We breathed happy when we saw it open.

Q. Were the waves still washing over the ship?

A. Yes, sir; and as soon as I opened the gangway all of that

portion of the deck was cleared off, as they were all in a pile—all the oxen.

Q. And did you and your men clear away what wreckage was left?

A. Then when the gangway was opened, commencing at six o'clock in the morning, the decks were swept.

Q. The waves dashed over the vessel so that one of your men was washed over also, wasn't he?

A. Yes, sir.

Q. How long did the bad weather continue?

A. Up to the 1st of November, at about six o'clock in the afternoon; then we could see that the weather was improving.

Q. About how long did the vessel remain hove to?

A. From the afternoon of the 31st until the 2d, at 3 o'clock in the morning.

Q. Did this heaving to help the condition of affairs on the vessel?

A. Yes; otherwise we couldn't have stood it.

Q. All the cattle that you carried were not lost, were they?

A. I think that there were thirty-nine left.

56 Q. Where were they?

A. Forward of hatch No. 3.

Q. Is there a turtle-back on the bow of the steamer?

A. Yes, sir; and they were under the turtle-back. There must have been about ten or twelve on each side.

Q. This turtle-back broke the force of the waves forward, did it?

A. When the vessel is not going very few seas come over the bow; it is high.

Q. The bow, then, is higher than the after part of the vessel?

A. It is seven feet higher.

Q. How many years do I understand you to say you had had experience in carrying cattle?

A. Thirteen; nine as a captain and four as an officer.

Q. Have you ever lost cattle before?

A. In the steamer *Frederick*, in 1887, when I left New York for Bristol, a sea carried away twelve. I have had no other accident than that, carrying cattle about twice every year.

Q. Was that as terrific a storm as this one?

A. Not at all; it was almost in fair weather.

Q. Was this, then, an unusually heavy hurricane?

A. One of those that I have seldom seen—that I have never seen.

Q. In your opinion, from your past experience in carrying cattle, could the cattle that were lost in this way have been saved even if the weather had suddenly moderated?

A. Those oxen were too much damaged to have been saved, because those that lay on their backs with their feet and legs in the air it was impossible to save them.

Q. Did the cattlemen give you any assistance in the way of caring for the cattle during this time?

A. I saw the cattlemen for the last time on the morning of the 31st when we last fed the cattle, and I saw him—the foreman of the cattlemen—on the morning of the 2d, about nine o'clock, when I

went to force him to come out and feed the cattle. They say that one of them, on the 1st of November, in the afternoon——

Q. Who say?

Mr. Parkin objects to "they say."

57 A. One of the sailors told me on November 1st one of the cattlemen wanted to come on deck——

Mr. Parkin again objects.

A. (continued). I did not see whether he came or not; but in endeavoring to come up he fell downstairs and either broke or hurt his arm, and with his arm in a sling he landed in Liverpool.

Cross-examination by Mr. PARKIN:

Q. Captain, do you know what was the name of the *Hugo* before this company bought her?

A. The *Gallic*, I think.

Q. One of the White Star steamers?

A. Yes, sir.

Q. Were her decks iron or wooden decks?

A. Iron deck covered with planking.

Q. How many feet did she draw forward when she left New York?

A. I don't recollect exactly; but the medium between bow and stern was 22 feet 4 inches.

Q. Do you know how much she drew aft?

A. I do not remember, because I have not had the book to see.

Q. Is it entered in your log book?

A. Yes, sir.

Q. Do you know who put up the cattle fittings?

A. I do not know; probably the carpenter that usually does that work.

Q. Who does the work usually?

A. I do not know his name; consignee's people.

Q. Do you know what the cargo consisted of?

A. General cargo.

Q. Did you have grain?

A. Grain, cotton.

Q. What else?

A. Flour, some barrels of oil and I don't remember what else.

Q. When the waves broke the cattle pens on the 31st, did they come over the rail and break them from above, or did they strike them at the side and break them?

A. They came in both ways; they would strike on the sides and go over, and sometimes they would come over without striking the sides.

58 Q. Did they come over that way when the cattle pens were first broken on the 31st?

A. On the 31st the houses were not broken; they were broken on the 30th. What were broken on the 31st were the provisional houses we had made.

Q. The houses that were broken on the 30th, were they broken by the waves coming over the sides of the vessel?

A. Yes, sir.

Q. And the waves came over the same way on the 31st, did they?

A. On the 31st they came worse than on the 30th?

Q. How were the stalls on the starboard side broken, by the cattle going against them or by the waves?

A. By both; by the cattle that were thrown against the sides and by the waves that she shipped from the leeward side when she rolled and the workings of the water that would remain there and carry pieces of boards.

Q. Do you know how many of the cattle went overboard on the 31st?

A. Probably ten or twelve towards nightfall.

Q. Were all the pens on the port side broken on the 31st?

A. Not all.

Q. Which pens were not broken?

A. Those that were on the port side forward of hatch No. 3 were not broken, and some that were aft and opposite hatch No. 5 were not broken until nightfall, but there were some boards off of them.

Q. Were the pens which were midships broken on the 31st?

A. I did not notice; I did not come aft after the afternoon.

Q. How many of the pens on the starboard side were broken on the 31st before nightfall?

A. Some by the gangway opposite hatch No. 4 were broken, and some of the floor boards were washed off.

Q. Were the floor boards washed off of the port side on that afternoon?

A. All opposite No. 4 and No. 3; the others I couldn't say; I didn't see.

Q. Were the pens on the port side and the flooring broken and washed away before the engines were stopped on that day?

A. From the morning those that were opposite No. 4 were
59 already off except those that I had nailed there when I placed the oxen there.

Q. Had you nailed the flooring to the deck when you put the oxen there in the morning?

A. Yes, because there were none there then.

Q. Had they been nailed there before?

A. They were not nailed on the floor.

Q. What time was it when you put the oil bags over?

A. The night of the 31st, between 12 and 1 o'clock at night.

Q. Had the waves been breaking over the port side before you put them over?

A. Before and after notwithstanding putting out the bags.

Q. Did you change your course at all after the morning of the 31st?

A. No.

Q. You kept right on the course until the engine stopped?

A. Yes.

Q. What was the course?

A. East-southeast is the right magnetic course for Liverpool, I believe.

Q. That is the course by the compass, is it?

A. By the compass.

Q. What is the true course for Liverpool from New York?

A. I don't remember from New York right either; I think it is north 75° east, about that; I don't remember. Give me a chart and I will tell you.

Q. Do you know what your position was at noon on the 30th?

A. I do not remember where I was.

Q. Had you passed the banks?

A. Passed the banks.

Q. Do you know how far past the banks you were?

A. About two days past them.

Q. Have you your log here?

A. Yes, sir.

Captain identified log book and it is marked for identification and inspected by the counsel for libellants.

Q. Can you, by looking at your log book, tell me your position on the 30th and 31st?

A. That day, the 30th, at twelve o'clock, 47° 38″ latitude, 36° 47″ west longitude.

Q. Taken from Greenwich?

A. From Greenwich.

60 Q. Now, as to the 31st?

A. 48° 53″ latitude, 31° 37″ longitude.

Q. Now as to the 1st of November?

A. 48° 05″ latitude, 31° 37″ longitude.

Q. Were the cattle that went overboard on the 31st put there, or washed overboard?

A. After opening gangway No. 4, those that were down the water washed them off.

Q. Where were the cattle before they were washed overboard?

A. They were there at No. 4.

Q. In the alleyway?

A. In the houses where they were put in here, in New York.

Q. Were they washed out of the houses by the waves?

A. No, when the gangway was opened there was nothing there, the boards on the outside had already been washed overboard and the cattle were washed out.

Q. Were these cattle standing up that went overboard?

A. They were down. Some may have been up; I don't know.

Q. I understood you to say that the cattle were not much injured on the 31st in the afternoon, they were principally injured at night?

A. Yes, it was at night when they were badly damaged, with the exception of the ten or twelve that had come from the port side opposite No. 4; those were injured.

Q. Did you put the head of the vessel to the waves at that time during the storm?

A. No.

Q. Did the vessel have any list before you left New York?
A. No.
Q. Did you make the entries on the log book?
A. The entries are made by the first officer under my orders.
Q. When did you last read the log book?
A. I haven't seen it until it was brought here this time, since May.
Q. Will you describe to me how these pens were built? What sized posts and planking and how they were fastened in place?
A. Every four feet they put four posts, that is, I do not say this exactly. Then they put cross-pieces on top on the outside in length about seven feet high, boards are nailed on the out-
61 side of the rail; the same kind of boards that they nailed on the outside are used for covering the top, and in the front part of the house they put a heavy board about three feet high, and these boards contain holes through which the ropes are passed with which the cattle are tied, and on the floor boards are laid on the deck and on these they nail cleats, so that the cattle will not slip. Between every four oxen boards are placed so as to make a division, and that is about the construction of the houses.
Q. How are the posts fastened to the deck?
A. I have not taken particular notice, but in the same way that is customary.
Q. Are they simply stood on the deck, or are they nailed to the deck, do you know?
A. I have not taken notice.
Q. Did you have any conversation with the cattlemen on the 31st?
A. After the 31st, when I spoke to the men in regard to feeding and giving water to the cattle, I did not see them again until the weather let up. On Monday after the storm I made the foreman get up to come and attend the cattle and feed them; but as he was sick, very sick, he was useless for the work, and he did not want to perform any work during the trip.
Q. Do you know his name?
A. No, sir.

By Mr. CROMWELL:

Q. What was the matter with him?
A. He had the consumption, and you can examine him with the doctors in case you have any doubt.
Q. Wasn't he an efficient cattleman?
A. No.
Q. This was the foreman?
A. Foreman.
Q. Were the other cattlemen efficient?
A. There were three Jews, one German, and an Irishman, and the three Jews were worthless. Besides they were lazy and did not want to do any work. When I went to force one of them to work, he came forward and he made faces at me so that I should not make him work.

Q. When do you sail, Captain?
A. Next Thursday, I think.

62 Counsel for respondents offers in evidence the bill of lading endorsed by Messrs. Brauer & Co.

It is marked Respondent's Exhibit A.

Counsel for respondents states that he produces the ship's log and the engineer's log, called for by libellants.

Counsel for respondents offers in evidence from the ship's log (which is in Spanish) the entries of October 30th, 31st, November 1st and 2d (pp. 46 to 51).

They are marked Respondent's Exhibits B (pp. 46 to 51).

He also offers in evidence a translation of Exhibit B.

(The translation commences at p. 47, fourth line, ship's log.) It is marked Libellants' Exhibit C.

Counsel for respondents also offers in evidence from the engineer's log (which is in English) the entries of October 30th, 31st, November 2d and 3d.

They are marked Respondent's Exhibit D.

Counsel for respondents also offers in evidence as to the English law:

The *Ducro*, L. R., 2 Admir. and Eccles., 393.

Grill *v.* General Iron Screw Collier Co., L. R., 1 C. P., 600.

Burton & Co. *v.* English & Co., L. R., 12 Q. B. D., 218.

Taylor *et al. v.* The Liverpool and Great Western Steam Co., L. R., 9 Q. B. D., 546.

Wright *v.* Marwood, 7 Q. B. D., 62.

Counsel for libellants object to the citation of these authorities on the ground that the English law is not set up in the defense in this case; that it is not sufficient that the answer should allege that the contract, evidenced by the bill of lading, is governed by some law of England not set out or pleaded; that the answer should
63 set up what the law of England relied upon is. That there is no basis for the proof because there is no allegation as to foreign law; and, further, that the existence of the law has not been proved, even if proof of it were admissible.

The COURT: I shall be obliged to sustain the objection as to the proof of the law, that the mere citation of authorities is not proof of facts in evidence.

Mr. MYNDERSE: Then I shall have to ask your honor for opportunity to take formal proof as to the law.

Mr. MACFARLAND: Do you move to amend your pleadings?

Mr. MYNDERSE: No, my pleadings are sufficient. I am content to stand on my pleadings. I shall desire to take proof in regard to the law.

The COURT: I think it ought to appear in this case whether the contract was a New York contract or a foreign contract. I see it is signed by the same parties as the bill of lading.

Mr. MACFARLAND: I see no objection to putting the contract in evidence. Under your honor's suggestion we offer it.

The contract is marked Libellants' Exhibit 2.

Counsel for libellants offer in evidence the depositions of John Joyce and James Edwards, cattlemen on board the *Hugo*.

Mr. MYNDERSE: I object to the admission of these depositions as not rebuttal. These gentlemen have made their allegations of fault in their libel, and we have made our defense. Under the pleadings this was part of the libellants' case. They made their charges of loss and they charge specific faults and we have defended accordingly. I invited them to put in their depositions and they declined and said they stood on their pleadings and on the assignment of Mr. Brauer to the insurance company.

Objection overruled.

64 Counsel for libellants offer in evidence the testimony of Robert M. Hanna, examined provisionally, as heretofore stated.

Counsel for respondents objects to the admission of the testimony as not rebuttal, that there is no charge in the libel of improper navigation.

The COURT: The rule in the admiralty practice is that it is not deemed sufficient to make a general averment of negligence and stop there. It is designed that there shall be some specification of the kind of negligence; the respondent may always move for a further statement, and that is occasionally done, but the general rule of the supreme court providing that there shall be a concise statement of the ground of the action is not generally considered fulfilled by a mere statement that there was negligence, and accordingly it is the practice to specify more or less, at the same time reserving the right to amend under the liberal rule in regard to amendments, and to specify further particulars if new ones appear upon the examination of witnesses upon depositions, or upon trial before the court, where the matters are such as would not naturally be fully known to the pleader in the first instance. The rule about amendments is therefore very liberal, required to be so by statute. And the practice of the libellants is somewhat based upon the recognition of those circumstances.

Without some further explanation I should assume that when this libel was drawn it was not contemplated undertaking to prove that there was negligence in regard to the navigation of the ship, as to how she should be headed on an approaching storm, or on observing the approach of a hurricane, or that she should have laid with the wind on her starboard bow rather than in a different direction.

Mr. MACFARLAND: It is my duty to tell your honor that every point was the subject of consultation between Mr. Parkin and
65 myself when this libel was drawn, and we carefully considered whether it was broad enough to let in proof as to negligence of navigation.

Mr. MYNDERSE: Then they should be held to it; if it was the deliberate act of these intelligent counsel in drawing their libel,

they should be held to it. We made our proofs in this case last July, and they have never given an intimation until yesterday that there was any complaint or charge as to the navigation of our vessel. The only intimation we ever had has been the specific act of negligence set forth in the libel.

The COURT: I suppose the questions asked of Mr. Hanna were all based upon the testimony as it appeared in these depositions. Isn't that so?

Mr. PARKIN: Yes, sir; upon the depositions and the entries in the logs.

Mr. MYNDERSE: But they are relying upon personal statements, upon statements of witnesses who cannot be presumed to give all the facts as to the character of the sea, build of the vessel, and any special circumstances that might exist which could compel the master of a vessel to exercise his judgment; none of those are present.

The COURT: I don't see how I can make any different disposition of this testimony than what I suggested a few moments ago. I think it would be error in me to refuse to receive this testimony of Mr. Hanna. If respondents claim to be taken by surprise, and there is evidence they ought to have to meet this testimony, I must allow them to take it. I will allow a reasonable time for such purpose.

Mr. MYNDERSE: I except to your honor's ruling.

66 Deposition of John Joyce on behalf of libellant-, taken before H. R. Dulaney, notary public, at Baltimore, Maryland, January 13, 1893.

Present: H. R. Dulany, notary public; R. H. Smith, Esq., proctor for libellants, and George Cromwell, Esq., proctor for claimants.

JOHN JOYCE, a witness of lawful age, produced on behalf of libellants, being by me first duly sworn on the Holy Evangels of Almighty God, made oath, deposed and said as follows:

By Mr. SMITH:

1 Q. State your age, residence, and your occupation.

A. 31 years; Williams' stock yards, 2005 W. Pratt street; cattleman.

2 Q. How long have you been a cattleman?

A. Close on to seventeen years next March.

3 Q. What has been your duties as a cattleman?

A. Taking charge of the men—taking charge of the cattle and seeing that they are fed, and that nothing happens to them.

4 Q. Have you or not taken charge of cattle which were being shipped across the water?

A. Yes, sir; for years.

5 Q. How many years have you been engaged in taking care of cattle which were shipped from the United States to ports on the other side of the Atlantic?

A. Close on to seventeen years.

6 Q. Have you any idea how many voyages you have made?

A. A good deal over 100; I don't know exactly.

7 Q. From what port or ports have you usually sailed?

A. I have sailed from Boston, New York, Philadelphia, Newport News, Montreal, Halifax, and Baltimore.

8 Q. Were you or not on board the *Hugo* on a voyage which she made from New York in October, 1891?

A. Yes, sir.

9 Q. In what capacity?

A. Foreman cattleman.

67 10 Q. How many men did you have under you?

A. Five.

11 Q. How many cattle did you have in charge?

A. 165.

12 Q. Have you ever made any other trip on the *Hugo?*

A. Never.

13 Q. Do you remember the date when she sailed from New York?

A. Yes, sir; October 24.

14 Q. What day of the week was that?

A. Saturday.

15 Q. Did she have any other cargo beside the cattle?

A. General cargo.

16 Q. Where were the cattle stored; on which deck?

A. 97 aft on deck; 68 forward of the bridge on deck.

17 Q. On which deck?

A. On the top deck.

18 Q. What had you, if anything, to do with putting up the cattle fittings?

A. Nothing whatever.

19 Q. When did you join the ship?

A. Saturday, October 24.

20 Q. What were your duties, as you understood them, when you took charge of those cattle?

A. To water and feed them.

21 Q. Where was the feed stowed?

A. Forward No. 1 hatch.

22 Q. Was there none aft?

A. None aft.

23 Q. How were the cattle pens arranged aft?

A. In the wing, on both sides and amidships.

24 Q. How were the pens arranged forward?

A. The same forward.

25 Q. What did the crew of the steamship *Hugo* consist of?

A. Spaniards and Manillo men.

26 Q. What flag was she under?

A. Spanish.

27 Q. What kind of weather did you have after sailing from New York?

A. Very good up to the following Thursday.

28 Q. What change took place then?

A. It seemed we got in the tail end of a storm; blowing a little; taking some water amidships.

29 Q. Did the weather grow any worse?

A. Yes, sir; towards night it grew worse.

68 30 Q. You mean Thursday night?

A. Yes, sir.

31 Q. And how was the weather Friday?

A. Well, it was about the same as Thursday night—only not quite so bad.

32 Q. How was it on Friday night?

A. Friday night it continued.

33 Q. You say Friday was about the same as Thursday?

A. Yes, sir; it was not blowing quite as much; Friday night was about the same as Friday.

34 Q. And on Saturday?

A. It commenced to get good weather then: that is what we call good weather.

35 Q. How was Sunday?

A. Sunday was very fair, very good weather.

36 Q. Do you remember what day of the month Thursday was, when it began to blow?

A. The 29th.

37 Q. When you speak of the weather do you refer to the wind, or the sea, or what?

A. I refer to the sea and wind both.

38 Q. How was the sea during Thursday, Friday, Saturday, and Sunday?

A. Not no bad weather.

39 Q. What effect, if any, did the sea have on the vessel?

A. It washed down the back boards only on the pen abaft of the engine-room on the port side—the space of five cattle.

40 Q. Was that one pen?

A. Yes, sir; in order to get these boards out—they knocked the good stalls away, these Spaniards did, and cut the ropes of these five cattle—until I stopped them and put them out on deck to get the boards out.

41 Q. Do you mean you put the cattle out on deck?

A. We put the cattle out on deck.

42 Q. The boards which were knocked down as you say by the seas, were on the port side behind the cattle?

A. Yes, sir; the boards behind the cattle to keep the spray from going over them.

43 Q. When did that happen?

A. It was Thursday afternoon; I don't know exactly the time.

44 Q. Was that pen repaired or not?

A. Yes, sir; that pen was repaired.

45 Q. Who repaired it?

69 A. The carpenter; he put up just common, thin boards; it was no good; they fired the good stanchions overboard.

46 Q. Were the stanchions that were there originally carried away by the sea?

A. No, sir; they knocked them away.

47 Q. Do I understand you to say the same stanchions were not put back again?

A. No, sir; they throwed them overboard.

48 Q. Who took the cattle out of that pen?

A. Me and Edwards and the other boys.

49 Q. Were they, or not, put back again?

A. Yes, sir; we just took them out for that night; there was no danger of them, we only wanted to keep them out of the wet; we kept them in the alleyways during the night, between the cattle pens.

50 Q. When was the stall repaired?

A. It was repaired the first thing Friday morning.

51 Q. Did the seas do any further damage, after that, to any of the pens?

A. The pen forward—smashed that in.

52 Q. Do you mean forward of the bridge?

A. Yes, sir; on the port side.

53 Q. When did that take place?

A. The same time.

54 Q. On Thursday?

A. Yes, sir.

55 Q. What was done with that pen?

A. We had plenty of space other places and we didn't bother with that; we just put the cattle in another place.

56 Q. Were they moved to another stall?

A. Yes, sir.

57 Q. Was, or not, that stall repaired?

A. No.

58 Q. Was there any other damage besides that to those two stalls that was done on Thursday by the seas?

A. That was the only damage done.

59 Q. What damage, if any, was done to any of the stalls on Friday?

A. None whatever, only what the crew done.

60 Q. What was done by the crew on Friday to the stalls?

A. They started to drive the cattle over; the captain says to me they was going to drive them over; I told him they better not; he could not speak much English; he gave me a kind of gruff answer in Spanish, and I went away from him; I left him to go to work.

61 Q. Was that Friday of Saturday?

A. That was Friday.

62 Q. Tell all that was done by the captain and crew on Friday.

A. They took the cattle in their charge, of course, and they started to cutting the ropes and getting them over the best way they could; we would not assist them in any way whatever; I would not allow any one to put a hand to them, of my men.

63 Q. How many days did they put cattle overboard?

A. Two.

64 Q. How many were put over the first day?

A. That I could not tell; they had them scattered all over the ship—quite a lot.

65 Q. Were there some put overboard from forward and some from aft?

A. Both places—put them over aft first.

66 Q. Will you state how they put them overboard?

A. They shifted the rail as it is called—the gangway; then they tore up the pens facing the gangway so they would slip on the iron deck; then they would take pitchforks and everything else, and sticking them in them drive them up to this place, and when the ship lurched over like, they would shove them and the cattle would slip off; if they didn't slip off, four or five sailors would put their backs to them and shove them over; once they started going, they had to go.

67 Q. Was this done on one side or both sides?

A. It could only be done on the one side—the starboard side.

68 Q. Why could it not be done on the port side?

A. Because that was the weather side.

69 Q. Which was the weather side?

A. The port side.

70 Q. Did the vessel have a list?

A. She had a list when we put about—on account of the trysails being over.

71 Q. State whether or not anything was done to get the cattle overboard except what you have stated.

71 A. One bullock—a white bullock—in particular was very stubborn.

72 Q. What was done with him?

A. They put a rope on him and dragged him as far as the gangway, and then they used a maul on him—a big hammer.

73 Q. What did they do with it?

A. They hit him in the head and tried to kill him; they could not kill him, and they took ropes and got him over the best way they could; of course, when they started I didn't watch everything; I had no reason to watch.

74 Q. When they put the rope on him, how did they get him to the gangway?

A. With a switch and derrick; these ropes leads from the derrick to the deck; they attached that around his horns; dragged him up to the gangway and swung the gangway around; when they got to the gangway they took the rope off.

75 Q. How many cattle went overboard altogether?

A. 126.

76 Q. Was that all in those two days?

A. All in them two days.

77 Q. How many cattle were saved that were stowed aft?

A. There was not a bullock.

78 Q. How many were saved after that?

A. There was 39.

79 Q. Where were they stored?

A. Forward.

80 Q. How far forward were they?

A. They were the forwardest cattle of all; they run over about twice the length of this room, on both sides, up to this whaleback.

81 Q. Did the *Hugo* have a whaleback forward?

A. Yes, sir.

82 Q. Did the whaleback extend over the cattle?

A. No, sir.

83 Q. Was the cattle feed stowed forward of the cattle or aft?

A. It was forward.

84 Q. What reason, if any, could you understand the captain to give you for his putting the cattle overboard?

A. He claims that the ship was in danger.

85 Q. Was it, in your opinion, in danger?

A. None whatever.

72 86 Q. What was done with the ship during the worst weather?

A. Stood still.

87 Q. Do you mean to say she was hove to?

A. Yes, sir.

88 Q. How long was she hove to?

A. She might have been hove to 18 or 20 hours—probably longer.

89 Q. Do you remember when she was first hove to—what day and what time in the day?

A. Thursday afternoon.

90 Q. How long did she remain hove to at that time?

A. I think she was hove to all night.

91 Q. Did she then proceed on her voyage?

A. Yes, sir; she didn't proceed until Friday.

92 Q. When did she proceed?

A. In the afternoon of Friday.

93 Q. Did she heave to again?

A. No; she didn't have to after they got the cattle over.

94 Q. At the time the cattle were put overboard was she hove to?

A. Yes, sir.

95 Q. How did they head her with reference to the sea while she was hove to?

A. I got nothing to do with the navigation of the ship.

96 Q. You don't know?

A. No, sir; I am not supposed to.

97 Q. Did she carry any sails?

A. Yes, sir; they all carry sails.

98 Q. Were her sails spread during this bad weather?

A. Trysails were forward, I think.

99 Q. Do you remember whether any others were?

A. No others—I believe not—in fact, I didn't notice.

100 Q. It has been stated by one or two witnesses examined on behalf of the claimants in this case that all the cattlemen went below about the time the bad weather began, and were not seen on deck until after it was over; will you state whether or not that is true?

A. The cattlemen were on deck every day—eat their food on deck every day.

101 Q. The cattlemen?

A. Yes, sir.

102 Q. During the time the cattle were being put overboard were you, or not, on deck?

A. Yes, sir; certainly I was.

73 103 Q. All the while?

A. All the while; yes, sir; never went in the cabin only to sleep at night.

104 Q. How many cattlemen beside yourself were on deck at the time these cattle were being put overboard?

A. Sometimes all—sometimes one—because they had nothing to do; I didn't care where they went.

106 Q. Did you, or not, make any protest against the cattle being put overboard?

A. Before he touched a bullock I told the captain not to do it.

107 Q. Were there, or not, some of the cattle knocked down in their stalls by the seas?

A. That is done every trip, but not to hurt them.

108 Q. Were there, or not, many of them knocked down?

A. No, sir; just one or two on a sudden jerk.

109 Q. Mention has been made of a bullock that was down on Friday morning on one of the hatches which could not be gotten up?

A. That's the white bullock I have been telling about.

110 Q. What was done with him?

A. They tried to kill him, and then throwed him overboard.

111 Q. Did they, or not, get him up?

A. Yes, sir; they got him to the hatch.

112 Q. Was he on his feet?

A. They didn't care whether he was or not; sometimes he was, and sometimes he was not—they put the winch on him to drag him.

113 Q. What was done, if anything, by the crew with the stalls to enable them to get the cattle overboard?

A. They knocked them down.

114 Q. State whether or not the cattle were freed from the ropes—whether they were loose?

A. They cut them adrift.

115 Q. Did you, or not, see them cut them adrift?

A. Certainly I did.

116 Q. What would you say as to the cattle fittings which were on that vessel, as to the character of them?

A. They were very strong, good fittings; that's just the time they commenced to get so particular and inspect them.

74 117 Q. What kind of deck did the *Hugo* have—upper deck—wood or iron?

A. Iron.

118 Q. Do you know whether or not the crew of the steamship took up the flooring put there for the cattle?

A. Yes, sir; they took up everything.

119 Q. What was the object in taking up the flooring?

A. To get the cattle overboard.

120 Q. How would that help them to get the cattle overboard?

A. Because there was cleats on the floor and they could get a foot hold; when they got them up, they just had the smooth deck.

121 Q. Did you, or not, see one of the crew of the steamship go overboard?

A. A boy; yes, sir.

122 Q. Were you on the deck at the time?

A. Yes, sir; standing at the engine-room.

123 Q. What was he doing?

A. He was shoving a bullock over; it was his own fault; the bullock started to go and he kept shoving, and he slid over with him.

124 Q. Will you state whether or not any of the bullocks that were put overboard were dead when they were put overboard?

A. No, sir; they were all as healthy as when shipped.

125 Q. How many cattle were discharged at Liverpool?

A. Thirty-eight head.

126 Q. What became of the other one—you said that there were thirty-nine left?

A. Throwed him overboard.

127 Q. For what reason?

A. Because he was dead.

128 Q. Had he been injured?

A. He got down and got cramped up.

129 Q. In what condition were the thirty-eight delivered?

A. Good condition; not a blemish on them.

130 Q. Do you know anything of the entries in the log of the steamship?

A. No, sir; if I asked them that question they would tell me to mind my own business.

131 Q. Whom did you ask?

A. I say, if I did; they never show us anything of that kind.

132 Q. How did the weather at that time compare with other storms that you have encountered when in charge of cattle being shipped on steamers?

75 A. I would not call it a storm; I call it kind of squally weather.

133 Q. Have you ever passed through storms much worse than that?

A. Yes, sir; twenty times worse.

134 Q. How did your cattle come through on such occasions?

A. Sometimes I lost a lot; sometimes they come through all right.

135 Q. Have you or not at other times passed through such weather as that without losing any cattle?

(Objected to.)

A. Ought not to have lost a bullock this time; ought to land all of them at Birkenhead—no need to have lost a bullock.

136 Q. What was the state of mind of the crew of the *Hugo* at the time of this bad weather?

A. I don't know; we never mixed with them.

137 Q. I mean, were they or not affected by the weather?

A. They went about their work.

138 Q. Was the captain cool during this time and deliberate?

A. Sometimes I saw him; sometimes I did not.

139 Q. Did he or not seem at all frightened by the weather?

A. I don't know; he must have been or he would not have done what he done.

140 Q. Were you sick at that time?

A. No, sir; I had a heavy cold.

141 Q. Did you have it then?

A. It was just starting on me then; didn't do me no harm then.

142 Q. Were you or not equal to all your duties at that time?

A. Yes, sir; equal to do my duty right up to the day I came here.

143 Q. How long have you been in this hospital?

A. About 10 weeks.

144 Q. Where did the cattlemen live on the *Hugo?*

A. Forward.

145 Q. In the forecastle?

A. Yes, sir.

146 Q. Where did the cattlemen take their meals?

A. On No. 1 hatch; they had no accommodations; eat it on the hay.

76 147 Q. Did you or not feed any of the cattle during Thursday, Friday, or Saturday?

A. Fed them cattle forward—we fed all the cattle that they hadn't cut adrift.

148 Q. When was the last time you fed those cattle that were cut adrift?

A. Friday morning—just got done feeding them.

149 Q. It has been stated by some of the witnesses for the steamship that the cattlemen didn't feed the cattle. Is that a fact or not?

A. As I told you, the cattle was all feed until they started to cut them adrift; then I had nothing to do with them.

150 Q. State whether or not the feeding of the cattle was neglected at any time during that weather.

A. It was never neglected.

151 Q. The captain of the steamship says that on the morning of the 31st, which was Saturday morning, you, as foreman, told him that if he didn't take away the cattle from the alleyways—those that had passed the night in the alleyways—that you would neither feed nor water them; and that he replaced a few boards making up the houses, and that he nailed some cleats on the deck, so they would not slip, and they took the oxen and put them in this place and fed them and watered them.

A. Them five cattle he is talking about.

152 Q. Do you remember what took place at this time?

A. No, sir; I remember telling him to get them out of there so I could water and feed the cattle; but it was his fault they were there; they had no right to be shifted out of the pen.

153 Q. Were they fed then?

A. Yes, sir.

154 Q. He says that you refused to feed them and give them a drink until he took those cattle and put them back in that place. That is a fact, is it not?

A. No; that ain't no fact. I told him he ought not to put them there; I could not make him understand, so I didn't bother much with him.

155 Q. After the weather grew worse, the captain says that the cattle that had been in some stalls that had been broken
77 were going about wherever they could get, and that it was impossible for him to arrange to put them in any pens.

A. I told him not to interfere with them at all, because it was not his place to; we were put on there for that; they didn't understand cattle; there is a way of handling cattle, just the same as there is of doing everything else; we could handle more cattle in an hour than they could all the morning.

156 Q. Do you remember whether, after the weather became bad, the cattle were gathered together in a bunch on the starboard side?

A. No, sir; only when he cut them adrift, they were gathered there then; but they drove them there.

157 Q. Do you remember whether, or not, Sunday morning a great many of the cattle had their legs out through the outside rail of the vessel?

A. I know there was none of them had their legs out—not one bullock.

158 Q. Do you say no such thing took place?

A. No such thing took place.

159 Q. The captain states that at that time, the cattle were all down, with the exception of those towards the bow; some were dead; others with broken legs; some with their horns broken off; some on their backs—when did you see the cattle that Sunday morning?

A. Just as I told you—he had them all cut adrift; none were dead—no broken legs—no cattle down that I could see; I didn't care whether there was, or not, because they were out of my charge then.

160 Q. Were you on deck so that you could see?

A. I was on deck and could see everything.

161 Q. Where were you?

A. Standing talking at the engine-room.

162 Q. Where is the engine-room?

A. It is abaft.

163 Q. Was it between the cattle that were stowed forward and those stowed aft?

A. Yes, sir.

164 Q. So far as the saving of the vessel, and the lives of

78 the crew and cattlemen were concerned—was it, or not, necessary that the cattle should be put overboard?

(Objected to.)

A. Unnecessary; yes, sir.

165 Q. I say, was it necessary?

A. Necessary—no.

166 Q. The captain of the *Hugo* says on page 77 of his testimony that he saw the cattlemen for the last time on the morning of the 31st, when he last fed the cattle, and that he saw you—the foreman of the cattlemen—on the morning of the 2d, about 9 o'clock, when he went to force you to come out and feed the cattle; state whether or not that is true.

A. It ain't true; never had a word with him.

167 Q. According to his statement, neither you nor any of the other cattlemen were out from the 31st to the 2d?

A. It is not so.

168 Q. Did any of the cattlemen get hurt?

A. Yes, sir; one.

169 Q. Who was it—you or Edwards?

A. No; his name was Blumeheim, or some name like that; but that has nothing to do with the cattle.

170 Q. What kind of men were the other cattlemen who were with you?

A. They done all I required them to do.

171 Q. Had you, or not, ever been with Edwards before?

A. O, yes, sir.

172 Q. On several ships?

A. On several ships.

173 Q. Had you been with any of the other cattlemen before?

A. With one—the man that got hurt.

174 Q. Did, or not, the captain of the *Hugo*, or any one on board, request you, or any of the cattlemen, so far as you know, to do anything that was not done?

A. He has got no right to request me to do anything.

175 Q. But did he?

A. No, sir.

176 Q. Could you understand anything that he said?

A. But very little; yes and no, that's about all; he might be able to talk now—but he could not then.

79 Cross-examined by Mr. CROMWELL:

1 X Q. What did you do after the *Hugo* reached England?

A. Do what we always do—just go ashore there.

2 X Q. How did you get from England?

A. I came on a Cunarder—on the *Gallia*.

3 X Q. When was that?

A. About the Saturday after we arrived.

4 X Q. How was your cold in the meanwhile?

A. It was just coming on me then; didn't affect me any more

than just as you or anybody else might catch a cold; never done anything for it and had a worse trip the next time in the *San Pancreas.*

5 X Q. Where did you join the *San Pancreas?*
A. New York.
6 X Q. When did she sail?
A. She sailed the day after Christmas, a year ago.
7 X Q. In what capacity did you sail in her?
A. Foreman cattleman.
8 X Q. For whom?
A. The same man—Brauer.
9 X Q. How was your cold that trip?
A. It kept getting worse all the time ever since.
10 X Q. Did the *San Pancreas* go to England?
A. Yes, sir; same place.
11 X Q. How did you get back from England after that trip?
A. On a Cunarder.
12 X Q. Did you go out again?
A. Been going out ever since. I went out on the *Mongolian* of the Allen line; 275 cattle.
18 X Q. Where did you take those?
A. Liverpool.
19 X Q. What did you do after that?
A. Been going on different ships ever since.
20 X Q. Did you come back in a Cunarder as before?
A. No, sir; one of the line.
21 X Q. As a passenger?
A. Yes, sir; we always go and come as passengers.
22 X Q. What was the next voyage you took and when was it?
A. Well, shortly afterwards, on one of the Johnston boats.
80 23 X Q. What was the name?
A. The *Barrowmore.*
24 X Q. Where did she sail from?
A. Out of Baltimore.
25 X Q. Did you take cattle that trip?
A. Yes, sir.
26 X Q. In what capacity did you go?
A. Foreman.
27 X Q. How did you get back again to the United States?
A. I came back on one of the liners.
28 X Q. Did you go out again?
A. Yes, sir; home about 3 days.
29 X Q. On what vessel?
A. The *Queensmore.*
30 X Q. In what capacity?
A. Foreman; just the same; I always go that way.
31 X Q. Did you go out with cattle on any subsequent trips to that one?
A. Just kept going right along.
32 X Q. In any other steamers with cattle?
A. Nothing, only what I told you.

33 X Q. That was the last one?
A. No; several since.
34 X Q. What ones?
A. In the *Baltimore* twice, and on the *Oramore*.
35 X Q. Sailing at what time?
A. That is a hard thing to trace up.
36 X Q. They were the most recent voyages you took?
A. That was the most recent—the *Baltimore* two trips.
37 X Q. How recently was that?
A. About 4 weeks before I came into the hospital.
38 X Q. When did you come into the hospital?
A. I am sure I don't know the day; about 10 weeks ago.
39 X Q. How was your health during all these voyages?
A. Very well; it is my own fault I am here; I was near cured; I got the diarrhœa on me and caught a heavy cold with it and got all choked up with phlegm.
40 X Q. Is it the same cold that you had on the *Hugo?*
A. No; it left me; I had a slight cough, but nothing to hurt me; in one trip I didn't cough at all.
41 X Q. What is the trouble now?
81 A. Just this cold; I got all stuffed up with phlegm; the doctors have been giving me stuff to spit it away.
42 X Q. Have you had that trouble ever since the trip on the *Hugo?*
A. No, sir; I ain't been bad; I had a cough, but I ain't been bad except a couple of weeks before I come here.
43 X Q. Did you have that trouble often before the voyage on the *Hugo?*
A. Never.
44 X Q. Is your recollection very distinct about the events of the voyage on the *Hugo* to which you have referred? Do you remember clearly all the events of that voyage?
A. Well, yes, sir; because, you see, that is all I had to do was to stand and look as soon as he took charge, where if he hadn't taken charge, and such a thing happened as he states there, we would have been to work at the cattle; that is what we get paid for; we risk our lives a good deal sometimes; that is what we are paid for; but as soon as they took charge we left them go.
45 X Q. You took no charge of them or gave no care to them?
A. Took no hand in them at all when they took charge—only them they left; only them I landed; of course, I watered—seen they was watered and fed.
46 X Q. Why did you pick out those?
A. I didn't pick them out; they left them there; these cattle were left after the weather got good.
47 X Q. It was during the bad weather that you didn't take charge of them?
A. As soon as they cut them adrift I done nothing to them at all.
48 X Q. These 38 cattle were up forward near where you lived?
A. I lived in the cabin, up near where the men live.

49 X Q. The *Hugo* sailed on Saturday, October 24th, I understand you to say?

A. Yes, sir.

50 X Q. And the weather was good up to Thursday—on what day was the worst weather?

A. I should think Friday and Saturday; it was a blow more than anything else; didn't ship no heavy water at all.

51 X Q. Didn't any waves come over the sides?

82 A. Yes, sir; spray; but the way we call it heavy weather is when the seas come on board and smashes up things.

52 X Q. Nothing but spray came on board?

A. What we call spray.

53 X Q. Did it do any damage?

A. Just what I told you about the few boards.

54 X Q. Where was that damage done?

A. Forward of the bridge and abaft of the engine-room.

55 X Q. What day was that?

A. That was Thursday.

56 X Q. Was any damage done on any other day than Thursday by the water?

A. Not as I know of; they were knocking pens down and everything.

57 X Q. But I mean by the water?

A. I didn't see any; they done all the damage.

58 X Q. So that Thursday was the only day that any stalls were broken by the water?

A. Just a few boards; yes, sir.

59 X Q. You considered Thursday the roughest day?

A. No, sir; Friday and Saturday.

60 X Q. How was it there was nothing broken by the water?

A. Because they didn't give it a chance; they done all the breaking themselves with hammers and crowbars.

61 X Q. It was rougher on these days than on Thursday?

A. Not rough enough to break the pens; we didn't count the back boards as anything; they are easy knocked down. Supposing this is the side of the ship (indicating), these boards are nailed on the inside. Here's the water (indicating), and the least thing knocks them down; but that don't weaken the pen any, because the stanchions are all screwed on with a big bolt to the rail and fastened on the deck—fastened on top with bolts.

62 X Q. Were the stanchions broken on Thursday?

A. No stanchions were broken at all—only what they broke.

63 X Q. Were these boards that you refer to broken as much on Friday as on Thursday?

A. I told you I didn't know; they were breaking up things every way; that's all the boards I seen broken.

83 64 X Q. You saw nothing broken, except on Thursday, by the water; but all that you saw broken after that was broken by the men. It that what you mean?

A. That's what I see them do; I didn't see the water break any.

65 X Q. And the weather was rougher on Friday than on Thursday?

A. For awhile in the morning.

66 X Q. And that was the time the men were breaking the stalls—when the weather was rougher?

A. Nothing much to speak of; they started to break the stalls on Friday.

67 X Q. When did the weather begin to moderate?

A. Saturday.

68 X Q. It was worse during Thursday and Friday then?

A. Well, about the same. It was worse than Saturday; yes, sir.

69 X Q. Saturday was worse than Sunday?

A. Just moderating down; yes, sir.

70 —. So that the worst days, as I understand you, were Thursday and Friday?

A. Thursday and Friday.

71 X Q. Friday was the day that the crew began to break the stalls?

A. Yes, sir; Friday and Saturday.

72 X Q. Your recollection is very clear about that?

A. Yes, sir; I am most positive it was Friday.

73 X Q. Where were you when the crew began to break the stalls?

A. Standing at the engine-room.

74 X Q. And they began the operation when?

A. In the morning; I don't know what time.

75 X Q. Of what day?

A. I think it was Friday.

76 X Q. Will you describe more fully the way they proceeded?

A. Just the same way they would go to tear a house down. That's about all the describing I can do; started first to cut the cattle adrift.

77 X Q. That was Friday morning?

A. Yes, sir. Then they started to tear the pens down. If they could not get the cattle out of a pen they knocked it down.

84 What pens were not knocked down before they got into Liverpool they throwed overboard—they finished them.

78 X Q. Had the waves broken any of the stalls at that time?

A. I told you twice, that Thursday they knocked in the back boards.

79 X Q. That's all the damage done by the sea?

A. That's all I seen.

80 X Q. So that when the crew went to work to tear down the stalls, as you would to tear down a house, as I understand you, they were not broken at *at* all?

A. No, only what they broke.

81 X Q. Will you describe your own movements from Thursday morning on the steamer?

A. All my movements was to take and look around and see the cattle were all right.

82 X Q. When did you do that on Thursday?

A. Done it all day—do it all night. We do it day and night. We take watch and watch.

83 X Q. Do you remember Thursday distinctly enough to remember what you did the first thing in the morning?
A. I remember.
84 X Q. What did you do?
A. Watered the cattle, or had them watered.
85 X Q. Did you water them yourself?
A. No, sir.
86 X Q. Who did water them?
A. A man named Edwards.
87 X Q. Was Edwards under you?
A. Yes, sir.
88 X Q. At what time in the morning were they watered?
A. I think it was a quarter of six or six o'clock, or thereabouts; about a quarter of six; used to get up at half past five.
89 X Q. Do you remember you did that this morning?
A. I remember to do it every morning up until this accident happened.
90 X Q. What did you do after watering them?
A. Gave them a feed of hay—what we always done.
91 X Q. On what part of the ship were you at that time?
A. Sometimes on one part, sometimes on another. I go all over a ship where the cattle is.
85 92 X Q. Where were you when the first damage was done to any of the stalls?
A. I was up forward.
93 X Q. What part of the ship?
A. Forward.
94 X Q. What part of the ship forward?
A. Right forward.
95 X Q. Can you not describe it more exactly?
A. That's all that's necessary; just forward of the ship; could not describe every hole and corner of her; just forward of the bridge.
96 X Q. Near to the bridge?
A. No, sir; close to the forecastle.
97 X Q. Forward of No. 1 hatch?
A. Yes, sir.
98 X Q. What stall was the one first broken?
A. The one aft; I think the same sea must have broken them at the same time.
99 X Q. Did you see it broken?
A. Seen one of them broke.
100 X Q. Which one?
A. The one aft.
101 X Q. Could you see it from where you were standing forward?
A. No.
102 X Q. That is what I asked you——
A. No, sir; you asked me where I was after I fed the cattle; you didn't ask me nothing about the stall.
103 X Q. Where were you when the first stall was broken?
A. I was aft.
104 X Q. How long was that after you were forward?

A. It might have been an hour; might have been two.

105 X Q. During what time of the day was it?

A. In the morning; I don't know the exact time.

106 X Q. How was it broken?

A. By the water.

107 X Q. Can you not describe it a little bit more definitely than that?

A. I described it to you twice.

108 X Q. Did the waves come over and hit part of it?

A. The waves hit the boards and knocked them in.

109 X Q. And that was in the morning?

A. That was in the morning.

110 X Q. How much before noon; do you remember?

A. About an hour or so, perhaps.

86 111 X Q. And at the same time, as I understand you, there were some pens broken forward?

A. One pen—because when I went forward to see how the cattle was there was a pen broken.

112 X Q. Were there any other pens at any time broken but those two by the water?

A. That's all.

113 X Q. Until, as you say, you saw the men attack the others—were they sound and in good condition?

A. Just as healthy as when shipped.

114 X Q. What time of day did they begin to break down the stalls?

A. I think it was after dinner.

115 X Q. On what day?

A. On Thursday.

116 X Q. Where did they begin?

A. Aft.

117 X Q. How many of the stalls did they break that day?

A. I could not tell you; broke all they could—probably half or more.

118 X Q. On which side?

A. Both sides.

119 X Q. Didn't they have any system about it?

A. No; they ain't got no system about nothing—sailing ships nor nothing else; that's the fact; the ropes all over the deck; you are liable to break your neck; it's not like an American or English ship.

120 X Q. What half of the stalls were left on Thursday that they hadn't broken down?

A. The clean after ones.

121 X Q. Where were you all Thursday afternoon while, as you say, this operation was proceeding?

A. Talking with the engineers and looking on to see what they were doing—taking a look forward occasionally.

122 X Q. Did you go to your room at any time during that day?

A. No, never in that room from the time I sailed until I got to Liverpool, only nights.

123 X Q. What time did you retire at night?

A. Sometimes I used to be up all night.

124 X Q. Which nights?

A. The nights I had two men on that I could not trust.

125 X Q. There were two men of the five that you could not trust?

A. They used to go to sleep; so I used to watch.

126 X Q. Which men were those?

A. Two cheap men.

127 X Q. What nationality?

A. Jews.

87 128 X Q. What time did you go to bed Thursday night?

A. I don't know; it may have been 12 or 1 o'clock.

129 X Q. Were you not in bed, or at least in your room, during a larger part of this storm?

A. No.

130 X Q. How was your cold this time, during the storm particularly?

A. It was about the same as before it.

131 X Q. Did it trouble you much?

A. No, not much; nothing to make me neglect my duty; of course it bothered me more or less; at nights it used to bother me most; that's the reason I staid up so much.

132 X Q. It relieved you to be out in the air?

A. No; it relieved me knocking about; when I lay down I used to cough considerably.

133 X Q. When you lay down you used to cough?

A. Yes, sir; it was a very close room; steam heated; no ventilation in the cabin; it was not fit place to sleep.

134 X Q. What part of the ship?

A. Amidships.

135 X Q. Did the captain come down and arouse you at any time?

A. Never; never had a word with the captain; was as much as he could do to attend to his ship.

136 X Q. When did they get the last of the cattle over?

A. Saturday night or Sunday morning; I will not say which.

Re-examined by Mr. SMITH:

1 Re-D. Q. Did they get the gangways out before they broke the stalls, or after?

A. They had to break the stalls at the gangway to get the gangway out.

2 Re-D. Q. Were the stalls at the place where the gangway goes in?

A. Yes, sir.

3 Re-D. Q. They had to get that clear before they got the gangway out?

A. Yes.

4 Re-D. Q. Did the cattlemen have anything to do with helping them to get the gangway out?

A. They assisted them in no way whatever.

5 Re-D. —. Did any of the cattle get overboard before they got the gangway out?

88 A. No, sir; could not get overboard.

6 Re-D. Q. How did they get the gangway in position after they cleared the place?

A. They slid it to one side; it fastened to the rail of the ship; the gangway is part of the rail; they lashed it there.

7 Re-D. Q. Did they get the gangways out on both sides?

A. Only on one side—on the starboard side.

8 Re-D. —. Did they have the gangways out forward and aft as well?

A. Yes, sir.

9 Re-D. Q. But only on the starboard side?

A. That's all.

10 Re-D. Q. Do you know about what the length of the gangway is?

A. They run different; I should think this was about 12 feet.

11 Re-D. Q. Where was it stored before they put it in position?

A. It is part of a rail.

12 Re-D. —. Did you or not hear any conversation between the captain of the *Hugo* and the insurance agents of Liverpool after you arrived?

(Objected to.)

A. Yes, sir.

13 Re-D. Q. Will you state what you heard?

(Objected to.)

A. He stated in Spanish—the captain—that the cattle was washed overboard—as you got it there in his statement — legs broken; hanging out the rails—but he told the insurance man the cattle was killed and they were washed overboard, and that the rails were broken and the pens were broken; so I told the insurance man to take a look and see if he could find any broken rails. I told him about the gangway; then afterwards he went into the cabin; what happened there I don't know, but he said in the office in Liverpool that the captain acknowledged that there was no cattle washed over—that they shifted the gangway.

14 Re-D. Q. Did you go aboard the *Hugo* with the insurance agent?

A. No, sir; he always comes aboard.

89 15 Re-D. Q. Did you see him on board?

A. Yes, sir.

16 Re-D. Q. Was the captain there?

A. Yes, sir; on the saloon deck; I was on the main deck.

17 Re-D. Q. Did you hear the conversation between the captain and the insurance agent?

A. I did—that part I told you; that's all.

18 Re-D. Q. Did you, or not, contradict what the captain said in the presence of the insurance agent?

A. I didn't understand what he said, but there was a man there that did.

19 Re-D. Q. Was what the captain said interpreted in your presence?

A. Yes, sir; it was some man from some of the steamship offices—if I am not mistaken, from their own office—one of their own men—one of their clerks, maybe; I won't be positive; I won't swear to that.

Recross-examined by Mr. CROMWELL:

1 Re-X Q. What nationality are you?

A. An American.

2 Re-X Q. Do you speak Spanish?

A. No, sir.

3 Re-X Q. Do you understand it?

A. Very few words; just what I picked up.

4 Re-X Q. How many days do you state the crew of the *Hugo* were engaged in destroying the cattle pens and putting the cattle over?

A. Well, they was engaged two days; about a day and a half, I judge. Afterwards they were working around the deck all the time; you could judge—that boy got washed overboard, and they got him aboard again——

5 Re-X Q. On what day do I understand you to say that the crew began the operation of tearing down the stalls and putting the cattle overboard?

A. On Friday I think.

6 Re-X Q. I understood you to say it was on Thursday?

A. It was on Friday, I think; if I said Thursday, I said wrong.

90 District Court of the United States, Southern District of New York.

WILLIAM W. BRAUER and Others
against
COMPANIA DE NAVIGATION LA FLECHA.

NEW YORK, *April* 8, 1892.

Deposition of James Edwards, a Witness in Behalf of the Libellants.

Present: W. W. MacFarland, Esq., for libellants; Daniel Lord, Esq., for defendant.

The deposition is taken subject to all legal objections to be taken at the trial.

Q. What is your business?

A. Cattleman.

Q. Where do you live?

A. 1164 Second avenue, New York city.

Q. What was your business last October?

A. Cattleman.
Q. And in whose employ were you?
A. Mr. Brauer's.
Q. Of Richmond, Virginia?
A. Yes, sir.
Q. Do you remember sailing on the steamship *Hugo?*
A. Yes, sir.
Q. On what day did you sail?
A. I sailed on the 24th of October, 1891; on Saturday.
Q. Were you in charge of some cattle at that time?
A. Yes, sir; 165 head.
Q. For Mr. Brauer?
A. For Mr. Brauer.
Q. Tell me what sort of weather you had after leaving New York.
A. We had very nice weather.
Q. All the way?
A. No, sir, not all the way, but till Friday afternoon; it started to blow Thursday morning.

91 Q. And how long did it continue to blow?

A. Well, it continued to blow until Friday morning from the northeast, then it shifted.

Q. How long did it continue to blow hard at all?

A. Well, I don't suppose it blew hard for more than eight hours altogether.

Q. Where were the cattle on board this ship?
A. They were fore and aft.
Q. On the upper deck or the lower deck?
A. The upper deck.
Q. And how were they arranged on the ship?
A. They were in stalls; four in each stall.
Q. And those stalls were forward and aft on the main deck?
A. Yes, sir; that was the top deck.
Q. Was the ship hove to at all at any time?
A. Yes, sir.
Q. When was she hove to?
A. She was hove to about twelve hours.
Q. When—at what time?
A. I could not tell exactly what time she stopped.
Q. On what day was it?
A. It was Friday when she hove to.
Q. In the morning or the afternoon?
A. In the morning.
Q. Do you remember any cattle being driven overboard?
A. Yes, sir.
Q. Tell me who did that and all about it.

A. Well, the officers was there—the chief officer was there and the second officer and the sailors was there. The captain he was not there at the time.

Q. When did they begin to drive them overboard?
A. Early in the morning.
Q. Of what day?

A. Saturday morning, as I can recollect.
Q. Was the ship hove to at that time?
A. Yes, sir.
Q. Was it blowing very hard then?
A. No, sir.
Q. Was it very rough?
A. No, sir; it was not very rough either.
Q. Were the waves washing over the ship at all?
92 A. No; the water was coming in on the lee side more than it was on the weather side, by the roll of the ship.
Q. Were you on deck at that time at all?
A. Yes, sir; I was standing right there looking at them.
Q. Tell me when you went on deck that day.
A. I went on deck at six o'clock in the morning.
Q. Well, had they begun to drive the cattle overboard then?
A. No, sir; they were all up on the forecastle-head there.
Mr. LORD: The cattle?
A. No; the sailors.
Q. Tell me what you first knew or heard of their driving the cattle overboard.
A. Well, I see them all getting together and getting their mauls—that is, heavy hammers on board ship—and forks. They asked me for a fork; I didn't know what they wanted it for.
Q. Did you ask what they wanted it for?
A. To run the cattle over, they said.
Q. This was in the morning?
A. Yes; that was between half past six and seven o'clock that morning.
Q. Well, go on and tell me what was said.
A. They started in the after place and as soon as they started I went in there and told the other men about it, and I stopped work right there; as soon as they finished the forward part I stopped. I did not touch none of the after part at all, because they were busy then tearing up the sheds and stalls and getting the gangway ready. As soon as they got the gangway ready they tried to shove some off, but they had to take the flooring up—the false flooring which the carpenters put in in New York. After they got that up and the sheds out of the way, every time she gave a lurch four or five went over.
Q. They found they could not drive them over when the flooring was down?
A. No; there were cleats there on the flooring for the cattle's footing—on the false flooring. They attempted it, but had to take it up, and then on the smooth deck the cattle slipped and slid.
93 Q. So that they would slip on the smooth deck and they could force them overboard?
A. Yes, sir.
Q. Who was it told you that they were going to drive the cattle overboard?
A. The sailors.
Q. Did you have any conversation with the captain about it?

A. No, sir; didn't have none whatever, only he called me up before he started and said he would have to clear that hatch there.

Q. Which hatch was that?

A. That was right after; it must have been No. 3 or No. 4 hatch.

Q. Was that hatch covered by the stalls?

A. Yes, sir; it was covered with the flooring—the cattle was over it. There were ropes——

Q. Tell me exactly how these pens—these stalls were arranged on the ship?

A. Right along the wings on each side, and on this hatch where they first started there was I believe ten cattle on there—five on each side—their heads going one way and heads going the other.

Q. I wish you would take this piece of paper and draw the deck of the ship, and show how the pens were arranged on the ship?

A. I draw a diagram of the ship. Amidships there were no cattle; the cattle were forward of the engine-room and aft of it. There were pens along the rail of the ship, and one pen in the middle over the hatchway. In the middle pen the cattle headed both ways, both to starboard and port. In the pens along the rail the cattle headed inboard.

Diagram marked Exhibit A of this date.

Q. You say they began driving them overboard on the port side?

A. Yes, sir; on the lee side.

Q. That was to leeward?

A. Yes, sir.

Q. Did you say anything to the captain or the first officer about their driving the cattle overboard?

A. No, sir; I did not say anything to them, but he called me up and told me he was going to get that hatch cleared off; that he was afraid the weather might get worse, and there would be danger to the ship, or something like that. There was nothing
94 wrong at the time he spoke to me about it, and I went and told the other man that was with me, and we spoke—that was after he started getting ropes. You see, some of the pens were loose on account of the water loosening the flooring and broke the head-boards, and the sailors cut the ropes. That night we put the ropes on them; the boatswain helped me, and I put some on myself, and the next day we had them up all secure, and then started in.

Q. How long have you been in the cattle business?

A. Eleven years.

Q. How many trips have you made in charge of cattle?

A. I could not tell you how many I have made exactly; I have not counted them.

Q. About how many do you suppose?

A. I believe I have made sixty, at least.

Q. Do you make five or six trips every year?

A. Oh, yes; seven or nine, or eleven.

Q. Have you ever crossed in the months of September, October and November before this time?

A. All the year round, sir.

Q. Have you ever taken cattle over in worse weather than you experienced on this voyage?

A. Yes, a good deal worse—on worse ships, too, than that was for carrying them.

Q. How large a ship was this, do you know?

A. I could not tell you how long she was; she must have been in my estimation, about 400 or 450 feet long—something like that. It is one of the old White Star boats.

Q. The cattle were all secured well at this time?

A. Yes, sir.

Q. And the pens were all in good order?

A. Yes, sir.

Q. They were not broken at all?

A. No; they were all fixed up where they were broken.

Q. Had any of them been broken?

A. Yes, sir.

Q. How many of them?

A. About three pens, but the cattle did not come out.

Q. The cattle did not come out of the pens that were broken?

A. No, sir.

95 Q. What damage was done to the pens?

A. The head-boards were broken.

Q. Were those fixed up again afterwards?

A. Yes, sir.

Q. Now, from your experience in charge of cattle, do you think that it was at all necessary to drive those cattle overboard?

Objected to.

A. No, sir; I don't think it was necessary at all.

Q. How long were they engaged in driving the cattle overboard?

A. Well, very near all that day; they did not finish—get the deck cleared up till the next day, pretty well; took all the pens out, and everything; the flooring and the biggest part of the shifting boards, and everything like that; they left a few sheds back there, just the foot-boards of the pens.

Q. Were you on deck all the time they were driving the cattle overboard?

A. Yes, I was looking on—standing with the chief engineer.

Q. On what part of the deck were you?

A. The after part, right in front of that hatch there (indicating).

Q. At the time they drove the cattle overboard, was it blowing as hard or harder than it was the day before?

A. It was not blowing as hard.

Q. The weather had moderated somewhat, had it?

A. Yes, sir; it was black, but the wind was not so strong.

Q. When do you sail?

A. I sail tomorrow morning at eight o'clock.

Q. What do you sail on—what ship?

A. The *Michigan*, Atlantic transport; sail from 27th street.

Cross-examination by Mr. LORD:

Q. Did you ever sail on the *Hugo* before?

A. No, sir; never sailed on the *Hugo* before. I have sailed on very near every line that carries cattle, but I think she has only took cattle two trips before that. I know there is two parties been on her.

96 Q. Did you ever know the captain before?

A. Never seen him before.

Q. What nationality was the captain?

A. Spanish.

Q. Did he talk English?

A. He talked English.

Q. What nationality were the crew?

A. They were mulatto-s and Spaniards, and the only English people was aboard was two of the engineers; I know I was acquainted with two, and the chief engineer.

Q. The chief engineer was what nationality?

A. English or Irish, I don't know which.

Q. You said you stood alongside of the chief engineer when they were driving the cattle overboard?

A. Yes, sir.

Q. Did he say anything to you in reference to it?

A. He didn't have anything to say; he didn't put a hand to it.

Q. State all that the captain said to you in reference to the necessity for driving the cattle overboard.

A. Well, the captain called me up and said he would have to clear that hatch; that he thought the weather was going to get bad, and he was afraid the hatch might give way.

Q. That is all he said to you in reference to it?

A. That is all he said.

Q. Was that all that any of the other officers said to you on the subject?

A. They said nothing about it.

Q. So that the only conversation that you had was with the captain?

A. Yes, sir.

Q. What did you say to the captain when he said that to you?

A. I told him he would have to drive them over on his own risk. I walked away from him then. The other fellow went up to talk to him about some ropes, and something, and he told the other fellow the same thing.

Q. Who was the other fellow?

A. John Joyce.

Q. Where is he employed now?

A. He is in Baltimore?

Q. Is he also a cattleman?

A. Yes, sir.

Q. Had you ever sailed with him before?

A. Yes, sir.

97 Q. In what ship?

A. I spent sixteen years with him.
Q. What ships have you sailed in with him?
A. I have sailed on the Johnson line, on the *Baltimore.*
Q. When was that?
A. That was seven or eight years ago now.
Q. Any other ships?
A. No, I don't remember, but he has been sixteen years in the business.
Q. How many cattle were in the bow of the ship forward of the engine-room?
A. That is what I don't know. All I know is the amount that went aboard was 165, and there was 39 left after they got finished throwing them over. We lost one the day before we got in; that left us 38 head.
Q. Why was that one lost?
A. He was knocked about, one that got in amongst these that were running up the alley to throw over the gangway, so he happened to be a little wilder than the others, and he run in amongst these that were in the whaleback forward—she had a whaleback.
Q. You don't know how many were forward?
A. I don't know exact.
Q. Do you know how many stalls were in the wings after?
A. I don't know.
Q. Do you know how many stalls there were over the hatch?
A. You mean on top of the hatch?
Q. Yes, sir.
A. There was only supposed to be two stalls—five cattle on each side there on one hatch.
Q. I am asking about the hatch aft?
A. That is the one I am talking about.
Q. Then there were ten?
A. Ten on the hatch; five on each side.
Q. Then all the rest of the cattle that were aft were in the wings?
A. In the wings and in the amidships as well—away aft I call the after place—filled up with cattle—30 or 35 cattle.
Q. But you cannot tell how many stalls there were in the wings?
A. No, sir, I could not.
Q. Nor how many stalls there were amidships?
A. No, sir.
98 Q. Nor how many stalls there were forward?
A. I could not tell amidships.
Q. How many amidships aft?
A. There was about 8 stalls altogether aft.
Q. And there were how many cattle in each stall?
A. On the hatch there was ten, and after there was about nine, each side—about 18 cattle.
Q. That made 28 amidships aft?
A. Yes, sir.
Q. And all the rest——
A. All the rest was in the wings there, both sides.

Q. What direction was the wind Friday morning when they drove the cattle overboard?

A. It was north—northwest wind.

Q. And how was the sea?

A. The sea was not very bad.

Q. Do you know what course you had been sailing?

A. No, sir; I could not tell you that.

Q. Do you know how far you were from New York?

A. No, I could not tell you that because they are not fast boats.

Q. Do you know how the barometer was that morning?

A. I believe we were about—just to the eastward side of the banks to my recollection when it occurred.

Q. Do you know how the barometer was that morning?

A. I never looked at it.

Q. Did they drive any cattle overboard from the forward part of the ship?

A. Yes, sir.

Q. Where were the 39 cattle which you say were left?

A. They were under this whaleback forward and just a few cattle outside on each side.

Q. In other words, he drove overboard from the cattle that were aft of the engine?

A. Yes.

Q. And some of the cattle that were forward?

A. Yes, forward the bridge; they cleaned the after place out altogether.

Q. Did they open the hatch then?

A. No, sir.

Q. How was the rest of the weather afterwards?

A. It was nice.

Q. During the rest of the voyage?

A. Very nice weather.

99 Q. Did Brauer & Co. have the stalls erected, or were they done by the steamship company?

A. I believe the steamship company; they always do.

Q. You don't know about that?

A. No; I did not get down from Baltimore until the day before I went away.

Q. Did you ever see the bill of lading for the cattle?

A. I did not.

Q. You and the other fellow were the only persons in charge of the cattle?

A. Yes, sir.

Q. The ship's company did not have anything to do with them?

A. No, sir; no charge of them at all.

Q. Did either of you have the bill of lading—you or the other fellow?

A. No, sir; never carried them.

Q. You don't know the terms on which the cattle were shipped?

A. No, sir; I don't.

Q. Do you know what cargo the ship had on board?

A. No, sir; she was all loaded and ready for sea when I got to New York.

Q. Where did the cattle come from?

A. I could not tell you exactly where they did come from.

Q. You took them all on board here?

A. Took them all on board here; I believe they were native.

Q. Were the stalls all prepared for them when you took them on board?

A. Yes, sir.

Q. And you simply joined the ship with the cattle?

A. Yes, sir.

Q. Did you ever have any conversation with the officers in reference to driving the cattle overboard?

A. No, sir.

Q. Did you have any talk with any person except the captain?

A. No, sir.

(WITNESS:) Every pen has four steers, and there are boards between every pen. Two boards stand in between every four cattle. There are four cattle which stand side by side with nothing between them. Four cattle in each pen, and every four cattle divided off separate.

Q. Is that the regular way of shipping cattle?

A. Yes.

100 Q. And during your experience you haven't seen any other way?

A. Yes; about eight years ago they used to have two boards across.

Q. That is a proper way of shipping cattle, isn't it?

A. That is the best way.

Q. The way in which the cattle were shipped in the *Hugo* is the best way?

A. Yes, sir.

Q. What time did they get through driving them overboard?

A. Well, I couldn't tell you exactly what time in the day they got through; they were all that day.

Q. Was the ship rolling or pitching?

A. No; she was just heaving a little bit, taking a little water on the lee side more than on the weather side.

Q. Do you know whether she had any list?

A. I could not say whether she had or not. I didn't notice.

Q. You know what a list is, don't you?

A. Yes; a ship's cargo shifts.

Q. You didn't notice any?

A. No.

Q. She may have had a list without your knowing it?

A. Yes, sir; on account of her rolling.

Q. You didn't know what the cargo in the hold was?

A. I didn't know anything about the cargo.

Q. You are not a mariner in any way, are you?

A. No.

Q. You don't know anything about the sea except what you have picked up on your voyages with cattle?

A. That is all, sir.

Q. Did you hear the captain say anything to the other cattlemen that was with you?

A. No, sir; I didn't hear him say anything at all about it.

Q. Did he have any conversation with the captain?

A. Only about ropes. The captain was not going to give him the ropes, and they had some words about it, and that night he told the chief officer to give him some ropes forward.

Q. What night was that?

A. That was Friday night.

Q. After they had driven them overboard?

A. No; they were driving them over all day. I believe
101 it was Saturday when they drove them over; I ain't positive which day it was.

Q. You are not sure, then, which day it was?

A. I am not sure; I am rather forgetful now whether it was Friday or Saturday.

Q. How many days were you out?

A. I believe six days.

Q. And you are not sure which day it was?

A. I know I sailed from New York on Saturday, October 24th.

Q. What night did he go to the captain to get ropes?

A. That is what I am not certain about; I believe it was Friday night.

Q. The night before he drove the cattle overboard?

A. Yes; I was on watch that night.

Q. What were the ropes for?

A. They were to put on these cattle to tie them up where the sailors had cut the ropes off in the pens.

Q. When did the sailors cut the ropes off?

A. That afternoon.

Q. What was that for?

A. The pen was broke and they wanted to fix the pen up—part of the side was loose—and they cut the ropes loose from the head-board.

Q. What broke the pen?

A. The water.

Q. What pen was it that broke?

A. The pen on the starboard—right opposite the hatch.

Q. On the starboard side aft?

A. Yes, sir; it was only the head-board that broke; no cattle came out though.

Q. Did the water dash over the side so as to break the head-board?

A. The weight of the cattle coming against it broke it.

Q. Then it was not the water that broke it?

A. No; it could not get a chance to get at it; the head-board is turned away from the water.

Q. So it must have been the rolling of the ship and the cattle driving against it that broke it?

A. Yes, sir.

Q. And how many pens were broken?

A. There was two or three pens.

102 Q. Did the cattle come out on the deck?

A. None at all, only when they were taken out. They took the broken pieces of boards away from the cattle and threw them overboard, so we had to take the cattle out and put them in the alleyway, and after they had them all fixed up new we put the cattle back and secured them with new ropes.

Q. Are all cattle tied with ropes?

A. Yes, sir.

Q. This breaking of these pens was the only accident that occurred in the whole voyage over, was it?

A. That was all, sir.

Q. Except the driving of the cattle overboard?

A. Except the driving the cattle overboard.

Q. The only reason the captain gave you for driving the cattle overboard was to clear the after-hatch, was it?

A. That is all the reason.

Q. Did you understand perfectly what he said?

A. I understood him saying the after-hatch.

Q. When you found he was driving the cattle overboard besides those over the after-hatch, did you make any further remonstrance?

A. No, sir; my intention was to stay right there and look at them and saying nothing afterward; he could drive them all over if he wanted to; I was going to look after the balance.

Q. So far as you knew, you did not know whether there was any necessity for driving them over or not?

A. No, sir; I did not.

Redirect examination:

Q. Tell me what other vessels you have sailed on beside the *Hugo?*

A. I have sailed on the *Cufic*, White Star; sailed on the *Runic*, White Star; I have sailed on the *Grecian Monarch* before the Wilsons owned it; I have sailed on all the Monarch boats; been on the Anchor line.

Q. How do those boats compare in size with the *Hugo?*

A. I believe the *Hugo* is as big as them.

Q. Were you ever in the employ of one Goldsmith?

A. Yes, sir; I have been under Goldsmith's employment for, I believe, eight years steady.

103 Q. Did you sail on the *Gloucester City* shortly before you sailed on the *Hugo?*

A. Yes, sir; I had sailed on her about two or three months before that.

Q. Did you have rough weather on her?

A. Yes, sir; we had rough weather.

Q. You were in charge of cattle then?

A. Yes, sir.

Q. What experience did you have then with the weather and with the cattle?

Objected to as immaterial.

A. Well, we were about eight days out when she got into a very bad gale—a heavy sea running behind us and the boat was too small, and, in fact, it was not fast enough to run before it, and she took the sea over right forward of the hatch, on the starboard side going east, and washed the whole forward pens away.

Q. Did they drive the cattle overboard then?

A. No; we didn't know what cattle went over, but we seen the sheds and the pens and cattle overboard. I didn't know how many was over.

Q. Then did they drive them overboard?

A. No, not at that time; they were running all around the deck, and the officers and sailors were securing them wherever they could.

Q. Was that a rougher voyage than this?

Objected to as immaterial.

A. Yes, sir, a good deal rougher than this one; there were only five shoved overboard because we had no place to put them; the rails were all crowded and everything.

Q. You managed to save all the other cattle?

A. No; there was part of the cattle washed over.

Q. All those that were not washed overboard, and these five you had to drive over because you had no place to put them, you saved all the others?

A. Yes, sir.

Q. Have you frequently saved cattle in rougher weather than you experienced on the *Hugo?*

Objected to as immaterial.

104 A. Yes, sir; many a time.

Recross-examination:

Q. What is the size of the pens—how long and how broad?

A. I could not tell you exactly now how large.

Q. Give us a notion.

A. You mean the space where they stand in?

Q. How big are the pens?

A. About 8 feet, somewhere about that.

Q. 8 feet square?

A. Yes; I could not tell you exactly.

Q. You don't know the depth of the pen?

A. No, sir; I do not.

Q. Nor the breadth?

A. No, sir.

Q. Except your best notion is it is about 8 feet square?

A. Yes, sir; we never have nothing at all to do with the carpenter.

Q. You made no effort to save these cattle or any further remonstrance with the captain except that it was at his own risk; is that all?

A. Yes, sir, that is all; I had nothing to do with it.

Re-redirect examination:

Q. How long before the cattle were driven overboard were you able to go around and feed and water them?

A. I watered them every morning; it was in the morning they started and that night I was with my lamp all around the deck. I had to go from the nosing right around on the outside clean aft again.

Q. You did that before they begun to drive them overboard?

A. Yes, sir.

Q. Without any trouble?

A. Yes, sir.

Q. It wasn't so rough but that you could get around with perfect ease?

A. Yes, sir; I went on the outside and I didn't get hurt or even soaked through.

Q. Didn't get soaked through even?

A. No, sir; I have been on boats where I couldn't get around at all.

Q. And saved the cattle then?

A. Saved the cattle then; put a man on watch on each
105 end of the ship. It is only in the alleyway where the saloon is, like in these big boats, where the heaviest water comes over.

Q. And there were no cattle there?

A. There was no cattle there; it is around the saloon and the stoke-hole and the engine.

Q. There was no water coming in there in this case, was there?

A. No, sir; the sailors and officers were there—the men at the winch there, was there working. The water that she took over the weather side where the winch was wouldn't wash a good-sized dog overboard, that I saw. We were hove to at that time.

By Mr. LORD:

Q. You were hove to at that time?

A. Yes, sir.

Q. It was in the morning you went around to water the cattle?

A. Yes, in the morning we watered them; that was the same morning they were making an effort to run them off.

Q. In the evening before when you went around the deck, was the ship still hove to?

A. Yes, sir.

Q. Was it hove to all night?

A. Yes, sir.

Q. And still hove to the next morning?

A. Yes, sir.

Q. When the cattle were driven overboard?
A. Yes, sir.
Q. Did you say anything to anybody why she was hove to?
A. I asked the engineer.
Q. What did he say?
A. He said the weather was so rough they were afraid they would get the cattle washed off.

ROBERT M. HANNA, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. PARKIN:

Q. What is your business?
A. I am inspector for the National Board of Marine Underwriters.
Q. How long have you been such inspector?
A. I have been inspector since the 5th day of March, 1887.
Q. What was your occupation before that?
A. Shipmaster and sailor.
106 Q. How long were you shipmaster?
A. I have been shipmaster since 1861.
Q. How long have you followed the sea?
A. I have followed the sea since 1853.
Q. Have you made voyages in sailing vessels and steamers both?
A. I have.
Q. Many voyages?
A. Many voyages.
Q. You have made voyages between New York and Liverpool?
A. Between New York and Liverpool and in fact New York and Europe; I have been seventy-odd voyages to Europe.
Q. Are you familiar with the laws which govern the course of storms in the latitudes in which New York and Liverpool lie and the courses steamers take?
A. The tracks the steamers take, yes, sir, I am.
Q. Is it possible for a vessel to determine by the barometer and by the course of the wind the direction from which an approaching storm is coming?
A. It is.
Q. Will you describe how that can be determined, say in the month of October or November, for a vessel which is sailing from New York to Liverpool, and what course such a vessel can take to avoid the vortex of the storm?
A. In the extratropical regions, that is, north of the latitude of 23°, the storms coming in from the West Indies recur in 33° and go off to the northward and eastward. Take the Gulf stream, for instance, as the path of a storm; the right-hand or eastern portion of that storm is the right arm of a storm; the left hand is the left arm; the centre would represent the vortex. The vessel going along on a course between the United States and England, the storm wave—that is, the wave that is called so—setting in anywhere from the southward, he would know that the storm wave was setting in at

right angles to the path of the storm; if the storm wave was to the southward, that the storm was coming up from the westward; if it was from the westward, that the storm was coming from the northward. A man not only knows by the storm wave, but by
107 the barometer and the changes of the wind, what is before him as far as forty-eight hours ahead of a storm.

Q. Suppose a vessel which sails from New York about October 24th, and in the afternoon of the 30th the wind comes fresh from the northwest, and the sea is from the same direction and from the west; in the morning of the next day the wind comes from the north, with seas from that direction and from the northwest, she proceeding on her course all the time from New York towards Liverpool; on the afternoon of that second day, after 12 o'clock, the wind has shifted, comes from the north and northeast, with the seas from that direction and from the northwest, the barometer falling during all this time, what would that indicate as to the position of the storm?

A. The position of the storm at that time was on the southwest side of the ship passing to the northeast, and it must have recurred close by in that locality.

Q. What course could a vessel take, under those circumstances, to avoid the vortex of that storm?

A. I presume it is understood the barometer was falling at that time?

Q. Yes.

A. It would indicate that the storm was to the southwest of the ship and overtaking the ship; the course the captain was adopting, running on in that course, the ship and the vortex of this storm were approaching each other; he should put his ship around to the northward and westward and lay to, with the wind on the starboard side, until that storm had passed.

Q. The laws in regard to the storms are well understood?

A. Oh, my dear sir, yes. Professor Emery Epsey, Lieutenant Maury, Fitzroy Smith, Captain Toynbee are all authorities on that subject.

By the COURT:

Q. How long have these sailing directions as to storms been generally known in navigation?

A. Seventy-five years, I expect. I know authorities running back fully that far, particularly Fitzroy Smith.

108 By Mr. PARKIN:

Q. Have you had any experience in demonstrating these laws?

A. I have had large experience in extratropical and tropical hurricanes. I was in one with the ship *Vera Cruz* two days out from Charleston. There were 280 lives lost out of 282—only two men saved. I was in the same storm, and there were many ships in company with us. I saw, the day after I left port, that the storm was approaching. I knew by the barometer and tidal wave what was flowing along that the storm was going to pass to the south-

ward of *of* me. Many ships were in company, most of them under bare poles. Every one seemed to know we were going to have a bad storm. I carried all the sails I could and went into the northwest, running a distance of about seventy-five miles, hove the ship to and came out of it safely. The other ship, about one hundred miles to the southward of me, was lost and only two lives saved out of two hundred and eighty-two.

By Mr. MACFARLAND:

Q. You went out of the vortex?

A. I got away from the vortex and she went into it.

By Mr. PARKIN:

Q. We will assume that the vessel of which we have been speaking is a steamer having a turtle-back over her bows, carrying a deck-load of cattle, the cattle being in pens on the two sides of the ship; she finds herself approaching a storm, the wind shifting in the way I have described—first coming from northwest, then from the north and then from the northeast; under those circumstances, what, in your opinion, would be the proper proceeding for the captain to take in order to protect his deck cargo as far as possible?

A. In my opinion—that is, a deck cargo—the wind shifting from the north in to the northeast or from the northwest to the north and northeast, was indicative of the storm passing to the south of the ship. He should have headed his ship south.

109 By Mr. MACFARLAND:

Q. It was plainly indicated?

A. It was plainly indicated beyond any doubt.

Q. A matter of common navigation?

A. A matter of common navigation. Every man who knows anything about the laws of storms knows that his vessel, with the wind changing from the north to the northeast by the way of the south, even from north to east or from northwest to northeast, should head his ship with the wind on the starboard side and thus avoid the vortex. In a case of that kind the ship and vortex are parting company.

By the COURT:

Q. You said he should head to the south?

A. By the way of the south, let her head go around by south, not put her around the other way, because as she falls off to the east if the wind is on the port side she falls off in the trough of the sea. I am only speaking of south in a sailing ship; in a steamship they can go around to the northward or southward, but a prudent master would go the other way and put the head with the wind on the starboard side, and let her lay head to the sea and lay comfortably; whereas, if he puts her with the wind on the port side he lays in the trough of the sea and the wind is constantly heading him off, particularly if the ship is stopped, and the decks will be swept.

Q. I understood you to say that he should put his vessel around to the north and west?

A. Yes, sir; by the way of the south. May it please your honor, we wear a ship; a vessel going to the east-northeast, when he found the wind was heading him off, he should veer his ship by the south into the northwest and lay with the wind on the starboard side.

By Mr. PARKIN:

Q. He should let the head of the ship first fall off towards the south?

A. First fall off towards the south and bring her up to the west with the wind on the starboard side.

110 Q. Until she heads finally towards the northwest?

A. As near the wind as she can. A vessel lying dead head to the wind is apt to pay off one way or the other; if you keep it on one bow she will lay to up to the wind, particularly if the screw is turning slow. There is always danger in the wind being first on one bow and then on the other. A man should always keep the wind on the starboard side when he has the wind changing from north to northeast, keep the wind on his starboard-side if he is going to stop for a storm and wait until it passes.

By the COURT:

Q. I don't understand the full explanation of this, what is meant by the way the ship is to be headed. You were speaking of a steamer that can continue on her course. Do you mean she shall not run her course?

A. If the weather gets so bad the captain determines to stop, he should heave the ship to; that is one of the first laws taught us.

Q. He doesn't know anything about the vortex, only that the wind is changing and the sea coming so and so; what should a steamer do?

A. The master of a ship should know how the vortex is coming from the changes of the wind, the falling barometer and the storm wave. If you will allow me I will explain to you the law of storms.

Q. I don't care about the law of storms. You are asked what the ship should do. I am not sure that I understand. She is heading going to Europe——

A. Somewhere about east-northeast.

Q. Under the circumstances of the wind changing as has been stated in the first question, you say the ship should be headed around to the south?

A. This is what I say with the wind to the northward and eastward.

Q. Under the circumstances what should the ship do?

A. If he wanted to heave the ship to that is what he should do.

Q. No matter what he wanted to do, what should the

111 ship do?

A. If the weather is moderate, proceed on his course.

Q. You have got all these elements in the question. Under the

circumstances stated in this question, carrying cattle in pens on the deck of the steamer, under shifting winds as before stated, and the weather becoming severe, what should the ship do?

A. That is what I understood. He should heave the ship to with the wind on the starboard side, bringing the wind forward of the beam on the starboard side.

Q. And how would the seas be coming under those circumstances?

A. The seas coming from the northwest and north, the ship would lie comfortably, she would pitch and rise to the seas.

Q. She would lie with her head toward the seas?

A. More towards the seas; yes, sir.

By Mr. PARKIN:

Q. Assuming the vessel does not put her head to the seas, but her engines are simply stopped and she is allowed to lie in the trough of the seas, what effect would that have upon a deck cargo?

A. Destruction; wash overboard; if the seas were heavy it would wash everything off decks.

Q. Would that make the vessel roll?

A. Certainly, most assuredly, make her pick up water both sides; she would roll from side to side and wash away everything on deck.

Q. Would you consider that a proper course with a steamer and cargo of cattle on her deck?

A. I certainly should not.

Q. Do vessels sailing from New York, Baltimore and Newport News for Liverpool take about the same track?

A. Yes, sir, they do; they go a little to the eastward of Sable island, and about half way to the banks they join on the same tracks.

Q. Do you know about the cattle steamers which sail from New York?

A. Yes, sir.

Q. Do they average about the same general time for a passage from New York?

A. Some of them are faster than others; for instance, take
112 the White Star steamers, they are very fast; the National Line steamers are slower; some steamers are faster than others.

Q. Did this steamer belong to the fast or slow class, the *Hugo?*

A. I am not familiar with the *Hugo;* I only know of the ship as a ship; I don't know anything about her speed.

Q. About what time do the vessels, the fastest ones, take to go from New York?

A. The White Star boats, I believe, go over in ten or eleven days; some of the other boats take sixteen or seventeen, and some of them eighteen days.

By the COURT:

Q. You are speaking of cattle ships?

A. Yes, sir.

Q. Is it your idea that the vessel should keep the wind on the

starboard side and about the same number of points off her bow all the time, that is to say, changing with the wind?

A. When we heave a ship to we try to keep the wind forward of abeam.

Q. I am asking you about your answers to the questions; the question put to you involved a gradual change of wind?

A. Yes, sir.

Q. Your answer didn't follow any changes; you spoke of putting it so and so; do you mean to put it so as to keep the wind about so much on the starboard bow all the time?

A. To keep the wind about so much on the starboard bow all the time.

Q. That would involve a change of course, changing with the wind?

A. Yes, sir.

Q. You would keep it how many points off the bow?

A. Three to four points on the bow; the vessel will naturally swing off a little more and come to, of course.

Q. Does it ever happen that cross-seas are to starboard of the wind in such a case?

A. The cross-seas to starboard?

Q. Suppose they were to the starboard, then they might be abeam?

A. Yes, sir; the cross-seas might be abeam, but the storm wave is never severe: it is a long rolling wave something like what
113 you landmen understand as a ground swell, coming in at intervals; it isn't dangerous; the dangerous sea is the sea that is brought by the wind and the rapid changes; in the cyclone the wind changes very rapidly, and as it changes it is necessary to bring the ship up and follow the changes of the sea, that is, when they are in the right-hand path of the storm.

Q. With the wind as above stated?

A. With the wind as above stated; yes, sir.

By Mr. PARKIN:

Q. With a vessel of this kind and a deck cargo as stated, when the indications first show that a storm was approaching, the barometer and the changes of the wind would indicate that a storm is approaching and the direction of it, as I understand; do you under those circumstances consider it good seamanship for a captain to continue that course if that is likely to bring him into the vortex of the storm?

A. No, sir; our instructions in all the books published are to wait on that storm, and not undertake to cross its path.

Q. Would you consider that especially your duty in the case of a steamer with a deck cargo?

A. I consider it especially incumbent on every ship-master going to sea—with the barometer falling and sea increasing and the wind veering, he ought to know a storm is approaching and get his ship away from the vortex of that storm and put her in a safe position.

Q. He should do that, as I understand, as soon as he discovers—

A. As soon as he discovers the storm approaching.

By Mr. MacFarland:

Q. Isn't it his duty to do that way when he has a load of cattle, as is the case in question?

A. Yes, sir.

Q. There are many dangers from the storm?

A. Yes, sir; liable to ship seas and take them off deck any time when he neglects that precaution.

Q. And, so far as you know, isn't that the common practice?

A. It is the practice.

114 Q. And you say it is the practice impressed upon you?

A. Impressed upon all ship-masters that when a storm is approaching, with the barometer falling and the ship continuing on her course, that the vortex and the ship are approaching each other and it behooves him to act at once and get out of the way, if he is on the starboard side, heave the ship immediately on the starboard tack; if he is on the left hand, run in to the northwest, and there heave the ship on the port tack and get away from the center.

By Mr. Parkin:

Q. Then you would consider it improper to keep on for twenty-four hours after the barometer and the shifting of the wind showed a storm was approaching?

A. Twenty-four hours before; yes, sir; every ship-master can tell twenty-four hours before when a severe cyclone is going to take his ship; I have noticed it as early as forty-eight hours, and seventy-two hours in many cases, down off Barbadoes, and between that and St. Thomas; the cirrus clouds and heavens and everything indicate a storm.

By the Court:

Q. What I don't understand is it seems to me that your first answer is contrary to the last, and I don't understand it yet. Your first answer was that those things show that the storm was about southwest from the ship and overtaking the ship, she going east-northeast?

A. Yes, sir.

Q. And you say these elements show the storm is southwest, which is very nearly astern of him?

A. A little bit on the starboard side would be the track. The vessel was going east-northeast and therefore crossing the line between the southwest and northeast.

Q. And going towards the north?

A. Yes, sir.

Q. The vessel should therefore be put around to the north?

A. Yes, sir.

Q. And west?

A. Yes, sir; that is, to the northward and westward, to the northward of west.

Q. And lie so until the storm had passed?

115 A. Yes, sir; because the storm would then pass out to the south of her.

By Mr. MACFARLAND:

Q. She ought to vary her movements all along so as to keep her head to the wind?

A. Yes, sir.

Q. Could you readily prepare a little diagram involving your idea?

A. Yes, sir.

By the COURT:

Q. As I understand you, you first said she should be put around to the north and west and lie so until the storm had passed; in your second answer you said she should have been headed to the south. I don't understand that.

A. I will try to explain. Heading the ship off is heading by the way of the south into the northwest, working her around to bring her on the other track—what we call in sailor parlance "wearing the ship," instead of tacking; when we wear her she goes off on the port tack.

Q. What difference does that make with the steamer?

A. It makes a great deal of difference, sir.

Q. I suppose you are speaking of an instant change. When a master finds here is a certain state of things he wants to get away; you say he wants to bring the wind so much on his starboard bow; that is only a matter of a few minutes?

A. Head her by the way of the south while she has her way on her and not plunge her into the sea, and she comes up into the wind on the other side.

Q. You say she should be put around to the north and west and lie——

A. And lie there, yes, sir. You confine me to the question if the storm is a revolving storm.

By Mr. MACFARLAND:

Q. You mean that is the way of getting around up?

A. Yes, sir.

By the COURT:

Q. I want you to state what you mean. You said first she should be turned around to the north and west, and last that she should be headed to the south. Now those don't accord on the record. If you don't mean that she should lay head to the south, state where she should head.

116

A. I told you wearing the ship around by the south to the west.

Q. She should wear around to the south?

A. That is what I said.

By Mr. MACFARLAND:

Q. If I understand you, you want to get the head of the ship up to the north and northwest?

A. Yes, sir.

Q. Now, when you are talking about the south, you are speaking of the way of getting around to get there?

A. Veering the ship by the way of the south to bring her head up so that she will have the wind two or three points on the starboard bow; having the wind north-northwest or northeast to bring her up to the wind as it veers.

Q. You say in the case of a sailing vessel the southern way is the only way?

A. The only way; but it is dangerous under any circumstances for even a steamer.

Q. And in the case of a steamer it ought to be done, but it could be done the other way?

A. But it could be done the other way; in case of a sailing vessel you can do no other way, but in case of a steamer you can do both, but it is more dangerous.

(Mr. Mynderse here appears, not having been present during the direct examination, and the court states the main points of the testimony.)

Mr. MYNDERSE: If your honor please, all this testimony is immaterial under the pleadings. The only charge in the libel is that of driving these animals overboard because the master was panic-stricken or lost his head.

The COURT: Mr. Macfarland asked to take this testimony provisionally, and I have allowed it. You can cross-examine the witness.

117 Mr. MYNDERSE: I will cross-examine him, reserving my objection. If the testimony is admitted I may want to call witnesses.

Cross-examined by counsel for respondents.

By Mr. MYNDERSE:

Q. What have been your experiences at sea; in what class of vessels have you made your voyages?

A. I have only been on one voyage in a steamer to Europe—not even to Europe; from Europe to the United States, from Hamburg to New York; I have been on one voyage on the steamship Bavaria.

Q. As master or passenger?

A. As passenger.

Q. You have never commanded or have been an officer of steam vessels?

A. I have not, but I have been a passenger on them many times; I have traveled all over the world in steamers for my company.

Q. I understood you to say you had been a passenger from Europe only once?

A. From Europe to the United States. But to South America and to the West India islands——

Q. From Europe?

A. From the United States. One passage from Hamburg to New York on the steamship Bavaria.

Q. That comprises your entire experience between the United States and Europe on board of steamers?

A. On board of steamers, yes, sir.

Q. And how long ago was that?

A. That was in 1862.

Q. What are the special facts in Mr. Parkin's hypothetical question that lead you to the conclusion you have made as to the location of the storm?

A. From the falling barometer, the shifting of the winds, and the position of the ship.

Q. I know that, but just tell me what position of the ship and what change of the barometer, and what shifting of the winds, has led you to the conclusion you have announced?

A. The barometer falling, the ship going on an east-northeast course, the wind shifting from northwest to north to northeast, that led me to this conclusion.

118 Q. Shifting from the westerly of north to the easterly of north?

A. Yes, sir; with a falling barometer.

Q. Go on.

A. The idea that the storm and the ship were approaching each other.

Q. And that the storm was where?

A. On the southwest side of the ship.

Q. Did it give you any indication as to the power of the storm?

A. The falling barometer would give me indication; the actual wind that was on hand would give me indication were I there.

Q. Did it give you any indication as to the distance of the storm?

A. The falling of the barometer would; if the barometer was falling rapidly it would show a near approach to the centre of the storm; if falling gradually, say one-tenth of an inch every three or four hours, it would show it was a longer distance away; but falling one tenth of an inch an hour it would show it was very near by and somewhere within a hundred miles.

Q. Those data you have not?

A. Those data I have not; no, sir.

Q. Has the force of the wind been given to you?

A. No, sir; they said it was a strong wind, heavy wind, increasing weather.

Q. They used only adjectives; didn't give you any figures?

A. No, sir; didn't give me the force of the wind.

Q. And as to the falling of the barometer, did he give you any figures?

A. No, he said it was falling.

Q. Did he apply any adjectives to that?

A. He did not; falling fast, he said.

Q. He gave you no figures as to the rate of the fall?

A. No figures; not even the height of the barometer.

Q. It is pretty hard on those data to say how far away the storm

was, or what was the force of it—what the strength of it would be when it came, isn't it?

A. The real height of the barometer don't amount to anything; it is the amount it rises and falls in the place where you are that indicates the nearness or distance of the approach; the rapid rise or rapid fall shows you when you part company with it.

119

Q. Do you mean to say this rule of yours is an invariable rule?

A. It is not a rule of mine; it is a rule belonging to the several scientists that give us our idea on the barometer.

Q. Do you mean to say it is an invariable rule?

A. An invariable rule

Q. Absolutely so?

A. Absolutely. I have never known it in my experience since I was thirteen years old—or not that; since I was master of a ship I have studied the barometer, and was always told that the man who watched the barometer watched the ship.

Q. Can you judge unerringly as to the way the storm came from?

A. I might; I have never headed one in that respect; when the barometer has fallen sufficient to show a hurricane was approaching I have always got out of its path.

Q. Assuming there is a storm to the southwest of the ship, do you mean to say the vortex is to the southwest of the ship?

A. The centre of the vortex; yes, sir.

Q. What direction of the wind would you expect to encounter; how would the wind blow when you got to it when the storm was at its height?

A. Every storm—the advance portion of the storm—the wind is north-northeast, or east-northeast, according to the path; if the storm goes more to the north of northeast than to the eastward of northeast, the wind is liable to be in the southeast quarter.

Q. "Liable" to be?

A. But if the wind is northeast it blows very strong, and if it changes around to the southward it passes out to the right, and if it changes around to the northward it passes to the left. The law of storms is governed by well-laid-down rules.

Q. We have a good deal of difficulty, don't we, even on land where we have frequent stations for report, to predict storms?

120

A. Yes, but you must bear in mind that mountains and land deflect a storm, but on the ocean there is nothing to do so.

Q. Don't you know that the greatest difficulty our Signal Service encounters is respecting the storms that come from the ocean?

A. That is from the northeast. They have no observation for the Bermudas, and most of the storms come from the southeast on this Atlantic coast; they always begin to the southward first.

Q. As I understand you, from the data that Mr. Parkin gave you, which you have repeated, you expected this storm to be where?

A. Coming from the southwest to the northeast.

Q. Following this steamer?

A. Following this steamer's track.

Q. Hitting her on the stern?

A. You read every day about it; there is an article where vessels keeping well to the northward kept out of this storm, and where one going to the southward got into it; in yesterday's paper there was one.

Q. A good many steamers do get into storms?

A. Yes, sir.

Q. And they have competent navigators?

A. Competent navigators; yes, sir; most of them do.

Q. You think all storms could be avoided?

A. I say the dangerous portion could be avoided. There are many questions about storms; for instance, the greyhounds—they don't care, they rush right through, their ships can stand anything; but they don't carry cattle on deck; such vessels must take more care than an ordinary vessel.

Q. It is only with reference to vessels carrying cattle that you lay down that rule?

A. I lay down the rule to any prudent ship-master. If I was owner of a fleet of ships and had a master who didn't know the law of storms I would discharge him and wouldn't have him in a ship.

Q. And your method of avoiding this storm on the hypotheses given you was what?

A. My method was simply this: I would endeavor to get the ship around to the northward and westward, with the wind
121 changing from northwest to north and northeast; I would put the wind on the starboard side of the ship and get it as near ahead as I could, so the vessel wouldn't swing around the other way, turn her engines over slow and let her lie there until the storm had passed. These storms are all progressive, they all go from the southwest into the northeast.

Q. You would be in the storm but be lying by while it passed over you?

A. We will let it pass.

By the COURT:

Q. Do you claim keeping on the starboard side within two to four points of the wind carries you out of the vortex?

A. It does.

Q. And the storm that passes over you is less violent?

A. Yes, sir.

Q. And that the same time you ease your speed?

A. Put the stern of the ship to the centre of the storm.

By Mr. MYNDERSE:

Q. The vortex of the storm is from the southwest to the northeast?

A. Yes, sir; it travels along—it is kind of a disk.

Q. How would you get it on your starboard side by running off to the northward?

A. The wind is northeast, putting the ship to the northward would bring it on the starboard side of the ship.

Q. While the vortex of the storm was passing over you, or whatever part of it did strike you, while it was passing in what direction would the wind be?

A. It is everywhere, it whirls right around the compass; you must get on the opposite side of the vortex.

Q. When you are away from the vortex in what direction would the wind blow?

A. The further you are away from the vortex the smaller are the changes of wind, but close to it you wear around so quick in any kind of ship the wind would be on the other side before you could get clear—that is, very few ships ever got into the center of a storm and got out safely; I am speaking now of a hurricane, a regular cyclone.

122 Q. I want to get one thing from you that I don't get; it may be my own fault. The direction of the wind is one thing, and the movement of the vortex or the center from one point to another is another thing?

A. Yes, sir.

Q. The wind having moved over to the northeast and coming from the northeast, and the vortex being off to the southwest of you, which way would you have the wind blowing from if you navigated the vessel yourself at the time that the wind was the highest?

A. If you give me the question that the vortex of the storm is to the southwest—my hand represents the vortex of the storm; it is travelling in that direction; the ship is going east-northeast. I say veer the ship around like that, put her clean around and let her have this wind on this side; the storm then will pass astern of the ship and the ship and vortex will be separating all the time and getting further away.

The COURT: He said when the wind had been changing from the northwest to the northeast, in that direction, it shows the vortex is to the southwest; that the safe course is to put the ship with the wind some two or three points on the starboard bow and keep it there until the storm is over.

The WITNESS: Until the barometer commences to rise.

By the COURT:

Q. To keep the ship within two or three points of the wind on the starboard bow, lying in that direction. You claim by doing that that you are getting to the exterior of the circle?

A. Working away from the centre.

The COURT: And leaving the vortex of the storm astern.

By Mr. MACFARLAND:

Q. If I understand you, you mean to say these winds blow around in a circle?

A. In a circle; yes, sir. At the centre of the storm the wind is whirling right around, and for a ship to get in that centre very few ever get out. The sea and wind are dreadful. I don't know

123 of any ship that ever has passed through a vortex and gotten out.

By Mr. MYNDERSE:

Q. Which way would the movement of the wind be on the outside of that vortex?

A. On the right-hand side of the storm they would be veering from the east to the south, to the southwest, and end in the northwest, and finish blowing at right angles to the track of the storm. On the other side they would veer around from north to northwest to southwest, and end in southwest or possibly south.

Q. Taking the storm as a completed affair, with a regular vortex of its own, which way would the movement of the outer circle be?

A. The movement of the outer circle would be from the north to the northeast, blowing around to the east, moving around that way.

Q. From the north to the east, then to the south and west, and back to the north?

A. And if the ship had been put on the starboard tack the wind would gradually veer around to the south and they would get finer weather within twenty-four hours as the storm passed over. That would depend on the extent of the storm. In the tropics storms do not extend far, but on the banks of Newfoundland they get larger and extend further.

Q. At the time this wind shifts from the west of north to the east of north, he is not within the radius of the storm?

A. No; he is on the outside edge, and the rapidity of its shifting indicates his nearness to that vortex.

Q. Isn't he outside of the radius entirely if the movement of the winds is from the north to the east?

A. Yes; but that circle moves in a body. It has a progressive movement and the storm moves along and the vortex along with it.

Q. He is not in the circle at all?

A. No, sir; he is outside of the circle; he is in the right-hand quarter of the storm coming along that way.

124 By the COURT:

Q. The whole storm area is a circle, as I understand?

A. Yes, sir.

Q. Then don't say he is outside of the circle. If he is outside there would be no changes of wind.

A. My dear sir, if you were a sailor you would understand this in a minute. The centre of a storm is where the wind is whirling constantly. The ship is back on one tack and then on the other, and she whirls around and around. That is the centre of the storm—the vortex.

The COURT: We are not speaking of the centre of the storm.

By Mr. MYNDERSE:

Q. But there is a circle of wind moving from the north to the east and so on?

A. As you are away from it. I tell you the rapidity of the changes shows the distance away from the centre of that storm.

Q. What I want to get at is this: When this captain had the

wind change from northwest to northeast, so that he was in a wind that was blowing from the northeast, he wasn't in the circle at all; he wasn't in this revolving circle at all?

A. No, sir; he was away from it.

Q. Entirely away from the whole circle?

A. Yes; but not out of the influence of the storm. If he was outside of the influence of the storm he would have fine weather.

Q. But what is it that makes the wind blow from the northeast at that time, if the movement of the circle of winds around this vortex is from the north to the east?

A. What makes the wind blow from the northeast?

Q. To him.

A. Because he is in a certain position of the quadrant of that storm that the wind is northeast, and he might change in one hour and have the wind in another direction if he sailed toward the centre. If he put his ship head to the south and steamed nine knots an hour as fast as he could go, he would find the wind whirled around.

Q. You put the vortex to the southwest?

A. I do.

125 Q. And he is in the northwest quadrant of the circle?

A. No, he is in the northeast. If the ship is to the northeast of the storm, he can't be northwest of the centre. My hand represents the vortex of that storm. The ship is going across that east-northeast. If she continues on the storm and ship will meet.

Q. The vortex is off to the southwest?

A. Yes, sir.

Q. And he is in the northeast quadrant?

A. What we call the right-hand quadrant.

Q. The northeast quadrant?

A. Yes, sir. If he stops his ship the wind will blow around his stern.

Q. Wouldn't the wind then be blowing from the west?

A. No, sir. That is where you can't understand it. I wish I had the book of storms here. I have endeavored to explain it the best I know how.

The COURT: We have the chart and all those directions of the wind; we have the center and the circle. Counsel is examining you as to what answers you will give to his questions, and you had better notice the questions and observe what they are before you answer.

The WITNESS: I will endeavor to do so.

Q. Being in the northeast quadrant of the circle, of the storm circle, and the vortex being to the southwest of the vessel, how do you make it that he would experience wind blowing from the northeast, if you say the movement of the wind in this storm was from the north to the east; wouldn't that be from the west?

A. I have endeavored to say before that when a progressive storm, the center is traveling from the southwest into the northeast, the wind on the eastern side of that vortex is from the eastward;

on the left-hand side they will be from the northeast; on the right-hand side from the southeast; in the rear of it they will be from the westward; on the southwest side of it, to the rear, the wind would be to the southwest.

Q. There is no regular sweep of the wind in a circle around this vortex, then?

A. There is; but you must understand the vortex is a narrow place in comparison with the big circle, and the wind is indi-
126 cated by the low barometer. I could explain to you better, and probably you would understand better, by saying that the vortex represents the low barometer; the wind always blows from high to low barometer; it always blows towards the center. Take latitude 40°, for instance—and 40° is called the blow-hole of the Atlantic—and let the barometer there be low, and the wind would blow towards that center from all points of the compass if there was a cyclone there at that time; take, for instance, the barometer 28.50, or 28.60, or 28.90, or even 29.10, that center is progressing towards Europe, the northern part of Europe, and the wind is blowing toward that common center; it blows that way until finally it is within a radius of four or five miles, and is just whirling around, revolving. Haven't you seen the winds on the street? That is a cyclone. You have noticed how far outside of that the wind is affected, that the dust outside will not be affected, but the dust inside will be whirling around and lifting up.

Q. That is why I am asking why it is, if there is this circular movement around the vortex, and this steamer being within the influence of it as you claim——

A. She is not; she would not be right in it.

Q. She would have the winds from the northeast?

A. Because she is in the advance portion of the storm; she is ahead of the storm; the storm is overhauling her.

By the COURT:

Q. When the storm is advancing, the vortex is advancing from southwest to northeast, in which direction is the wind at a point directly ahead of the storm, and on the extreme outermost part of the circle ahead of the storm; in which direction is the wind moving?

A. It is moving there from the east, right towards the storm, opposing its motion; right from the east towards the center of that storm, opposing its motion.

Q. What is the direction of the wind?

A. It is from the east, going towards the west.

Q. You mean from east to west?

A. Yes, sir.

127 Q. If the path of the storm is northeast, then it would be a difference of four points?

A. It would be a difference of four points; yes, sir.

Q. The wind will not be southeast there?

A. No, sir; it will be southeast on the southeast side of that quadrant, and northeast on the northeast part of it.

Q. If that is correct, wouldn't it be impossible that there could be a circle around the vortex?

A. No, sir; it blows towards the center as it blows around a post, and as it strikes the post it would go around it. There is always a weak side to the wind—a weak side to the center; the left-hand side of the storm is supposed to be the weaker side; the left-hand side is the dangerous part, very close to the center.

Q. Does not the inrush of the surrounding air towards the low barometer of the center produce a strict vortex?

A. No, sir; it produces a circular motion.

Q. Then must not the wind on the outer circumference of the circle be at a tangent, at right angles to the path of the storm?

A. Yes, sir; that is correct.

Q. Then, if the path is northeast, how can the wind be east?

A. Are you speaking about the following wind—following after it?

Q. If that is so, how could it be, if the path of the vortex is northeast, that the wind on the exterior circumference of the influence of the storm could be due east?

A. When the storm is coming up—it is all plain enough to me. I would like to be intelligent enough to explain it to you.

Q. You said a moment ago you thought it moved in a circle and must be at a tangent to the direction of the storm. If that is so, and the storm moving northeast, the wind from the outer circumference must be from the southeast directly ahead of it; otherwise there would be no circle; if that is so, how could there be a circle about the vortex?

(No answer.)

The COURT: As I understand the matter, as the inrush of the wind towards the center of the low barometer is from all quarters, the result of it is physically that it produces a circle; it must be that; it can't be anything else; and at the path of the storm,
128 of the outer edges at the outer circumference of the circle, the path must be, of course, a tangent to the radii from the center. That being so, if the storm is moving to the northeast, the vortex is moving towards the northeast, then on the outer circumference directly ahead of that line of motion the wind must be from the southeast. It would depend on the line of the vortex, it would be either from the southeast or northwest, one or the two; it would not be east because that would be cross-wise.

By Mr. MACFARLAND:

Q. You didn't answer the court's question.

A. I have answered it the best I know how. If there was a line drawn from *this* corner over *there*, and *that* was the path of the storm, the wind on *this* side of *that* would go *that* way, and the wind on *this* side would go *this* way; and it would seem that while the storm would meet and follow in and blow after that and follow it along——

Q. Please answer the question so that it means something on the record.

A. When the storm is passing from the southwest to the northeast, the wind immediately in front of that will be from the northeast.

Q. You mean in front of the line of the storm?

A. I mean in front of the line of the storm; yes, sir. The wind due east from that center would be east; if it was on the north side or northeast side it would be northeast; if it was on the south side it would be southeast. I know no better way how to explain it than that.

Counsel for respondents calls for the bill of lading and the contract under which the cattle were shipped.

129 HENRY DESPARD, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. PARKIN:

Q. You are the manager in New York of The Reliance Marine Insurance Company, one of the libellants?

A. Yes, sir.

Q. How long have you been?

A. The last three years.

Q. That company insured some of the cattle on the steamer *Hugo?*

A. They did.

Q. How long had the company been insuring cattle in October, 1891?

A. About from the commencement of the month.

Q. Have you with you a statement of the risks which that company wrote upon cattle from the latter part of October to the early part of November, in New York?

A. I have.

Q. Will you state how many cattle were insured by you between the 20th of October, say the 19th or 20th of October, and the 5th or 6th of November, how many steamers?

Objected to as immaterial and incompetent.

By the COURT:

Q. Were these deck cargoes?

A. All.

The COURT: I think I must admit that.

By Mr. MYNDERSE:

Q. Did you see any of these cattle shipped on board any of these vessels?

A. Personally, no, sir.

Q. Never?

A. No, sir.

Q. You saw them neither at the time of departure or of arrival in Europe?

A. No, sir.

The COURT: All he can prove then is they insured certain cattle on board certain ships which sailed and no claims of losses were made.

Mr. MYNDERSE: And that is immaterial and irrelevant here.

130 The COURT: You may take this provisionally; I will consider whether that is admissible or not; I will pass upon it hereafter. It must appear what the witness knows.

Mr. MYNDERSE: We except.

By Mr. PARKIN:

Q. On the arrival of cattle steamers on the other side, are they regularly inspected by inspectors?
A. They are.

By Mr. MYNDERSE:

Q. Do you know that?
A. I do know that.

By Mr. PARKIN:

Q. By whom are those inspectors appointed?
A. By the marine underwriters.
Q. And are reports regularly made?
A. They are.
Q. Those reports are sent to your company, are they?
A. To my company and to the other companies interested in the cattle business.
Q. Are they acted upon?
A. They are.
Q. In the regular course of business?
A. Yes, sir.
Q. Now, will you state what shipments of cattle were insured by your company, say between the 19th of October and the 7th or 8th of November, 1891?

Counsel for respondents offer the same objection, and further that it does not appear that Mr. Despard knows of any shipments, only alleged shipments.

The COURT: I am allowing him to prove his insurance of cattle. It merely proves an insurance on alleged shipments.

Q. Now, will you state what shipments of cattle were insured by your company between the 19th of October and the 7th or 8th of November, 1891, for England from New York?
A. Fifteen steamers.
Q. How many cattle were carried on those steamers?

Objected to.

131 The COURT: Give the names of the steamers, the time of sailing, and the number of cattle on each.

A. *Persian Monarch*, sailed on the 19th of October, with 359 head. *Hugo*, sailed on the 24th of October, with 165 head. The *Alsatia*, sailed on the 29th of October, with 150 head. The *Ludgate Hill*,

sailed on the 29th of October, with 345 head. The *Illinois*, sailed on the 1st of November, with 244 head. The *Michigan*, sailed on the 8th of November, with 143 head. The *Boston City*, sailed on the 8th of November, with 211 head. The *Hindoo*, sailed on the 3rd of November, with 100 head. The *Colorado*, sailed on the 8th of November, with 62 head.

The COURT: I should think that is going far enough. This boat sailed on the 24th.

The WITNESS: There was one more in October.

Q. Had you any between the 24th and 18th besides what you have given?

A. No, sir.

By Mr. PARKIN:

Q. State how many cattle were carried.

The COURT: He can't testify to that.

Q. How many were insured?

The COURT: Wasn't there insurance on all?

The WITNESS: Yes, sir.

Q. State what losses were reported on those cattle.

Objected to as immaterial and incompetent.

A. 127 on the *Hugo;* 75 on the *Alsatia;* 3 on the *Ludgate Hill;* 3 on the *Illinois;* none on the *Michigan;* 2 on the *Boston City;* none on the *Hindoo;* none on the *Colorado.* The 31st of October was the steamer *Barremore*, 237 head; none lost.

Q. The reports which are sent not only report the number lost, but they also report the number that arrive, do they not?

A. Yes, sir.

Q. And if a vessel arrives with cattle on board on which none have been lost, it is so reported?

A. It is so reported.

132 Q. So the reports cover not only the losses but arrivals of cattle on the other side?

A. Yes, sir.

By the COURT:

Q. In this answer you have given part losses; does that include losses by sickness as well as by other causes?

A. It does.

Q. It doesn't distinguish between those lost by sea peril?

A. Not in the statement I have made.

Q. Do you have a report from inspectors on that point?

A. Yes, sir.

Mr. MYNDERSE: I except to all these questions, your honor.

By Mr. PARKIN:

Q. In the report made by the inspectors, can you tell what were lost through sea peril?

A. Not from this memorandum that I have; from the records in my office I can.

Q. Do you know the ship *Alsatia?* Her character as a cattle vessel?

A. Yes, sir.

Q. What is her character?

A. Not very good.

Mr. MYNDERSE: All this testimony is taken subject to my objection. I want to object especially to these questions about the *Alsatia*, unless it appears that the witness knows about the steamer and can describe her.

By Mr. MACFARLAND:

Q. In the course of your business as having insurance, is it your duty to know about the general character of vessels?

A. Yes, sir; it is.

Q. Is there an established way of finding out what the general character and quality of vessels is?

A. There is.

Q. A way resorted to by all underwriters?

A. By all underwriters.

Q. Did you obtain your information with regard to the *Alsatia* in that established way?

A. I did.

Mr. MCFARLAND: I submit the testimony is admissible.

133 The COURT: If that is a matter of official rating, I will allow the rating of those vessels to be given along with the rating of the *Hugo*.

By the COURT:

Q. Is it a matter of official rating?

A. Do you mean as to the character of the vessels for carrying cattle? That is rather a difficult question to answer. Every vessel is rated, but we don't always go on the rating of a vessel to determine what their character is for a certain purpose.

Q. What do you go on?

A. On the dimensions very largely, especially in the cattle business, on the dimensions of the vessel.

The COURT: That is a difficult field of inquiry. I hardly want to extend the testimony into that. I will take the rating of all these vessels.

Q. As they all carry cattle of course they belong to a class of cattle ships?

A. Yes, sir.

The COURT: I will take the rating of the vessels, each one of them; if this evidence is to be admitted at all I think that would be well to appear.

By Mr. PARKIN:

Q. Can you give the rating of each of these vessels?

A. Oh, yes.

Q. Will you do so?
A. Not from memory—from the books.
The COURT: You can supply that.

By the COURT:

Q. Do you know the rating of the *Hugo?*
A. Yes, sir.
Q. What is her rating?
A. I think she rated 100 A1.
Q. That means first class, does it?
A. That means first class.
Q. Do you recollect whether either of the others in the list you have given had the same rating?
A. Oh, yes; several of them had I know without reference.
Q. Which ones can you now state from memory as rating the same way?
134 A. The *Ludgate Hill*, the *Persian Monarch*, *Illinois*, *Michigan*, in fact all the vessels.
Q. Which one was the vessel that lost 75?
A. The *Alsatia.*
Q. Do you recollect her rating?
A. I don't recollect it. I think it was 100 A1.
The COURT: If that is correct, that is all that is necessary as to the rating.

By Mr. PARKIN:

Q. What is the particular feature of the *Alsatia* which, in your opinion, renders her not a very good cattle vessel?
A. Her narrow beam.

By Mr. MACFARLAND:

Q. What does the paper I now hand you purport to be?
A. Copies of the report of the outturn of cattle, received from Liverpool or other English ports by the attorney for the cattle Lloyds at Boston.

By the COURT:

Q. Boston, England?
A. Boston, Massachusetts.

By Mr. MACFARLAND:

Q. How did you obtain it?
A. I sent on for it.
Q. When did it arrive?
A. This morning.
Q. That is a copy?
A. That is a copy of the report for which you sent.

Mr. MACFARLAND: It is not at present admissible unless our friends will consent to its reception, subject to any amount of verification.

Mr. MYNDERSE: I shall not object to this except on the general ground that it is immaterial.

Q. You say you received this from your correspondents, the Lloyds?

A. We received it from our agents in Boston.

The COURT: Anything in that — is not very near the time of this affair I shall consider wholly inadmissible.

Mr. PARKIN: We will limit it between the 1st and 15th of November. The *Hugo* arrived on the 8th, two or three days before, and some on the same day as the *Hugo*.

135 Mr. MYNDERSE: It is subject to objection except as to the mode of proof.

By Mr. MYNDERSE:

Q. Do you know the beam of the *Alsatia*?

A. Not exactly; no, sir.

Q. About what beam?

A. It is under forty feet—I think thirty-seven; I can't tell exactly.

Libellants rest.

Testimony closed, with privilege to respondents to ascertain what they will do in regard to taking further proof on the navigation question, and as to the law of England.

United States District Court, Southern District of New York.

WILLIAM W. BRAUER and Others
against
LA COMPANIA DE NAVIGACION LA FLECHA.

NEW YORK, *January* 30, 1893.

Present: Mr. MacFarland and Mr. Parkin for libellants; Mr. Mynderse for respondents.

THOMAS PLASKETT THOMPSON, a witness produced, sworn and examined on behalf of the respondent in the above-entitled action, testifies:

By Mr. MYNDERSE:

Q. You are a master mariner?

A. Yes.

136 Q. How long have you followed the sea?

A. About twenty-eight years.

Q. In what class of vessels?

A. In all kinds.

Q. Been in sailing vessels as well as in steamers?

A. Sailing vessels of all sizes; I have been master of sailing vessels sixteen years.

Q. You are now master of a steam vessel?

A. The steamer *Bovic*.

Q. She is a steamer of the White Star line?
A. White Star line.
Q. Freight steamer or passenger steamer?
A. Freight steamer.
Q. Engaged in traffic between what ports?
A. New York and Liverpool.
Q. How long have you been in that trade between New York and Liverpool, in steam?
A. Four years.
Q. During that time have you been used to carrying cattle?
A. Carrying cattle every voyage.
Q. That is every voyage from New York?
A. Every voyage from New York to Liverpool.
Q. And sailing how frequently from here?
A. Sailing every month; make about eleven trips annually.
Q. Do you know the steamer *Hugo* at all?
A. I know her by name and I have seen her a few times.
Q. She used to be the steamer *Belgic?*
A. Yes.
Q. Is she engaged in any particular trade or is she a general vessel of the tramp species?
A. A general vessel, yes, a tramp.
Q. The *Hugo* sailed from New York about the 24th of October, 1891, and the wind moved from the southward up to the westward and northwest. At the beginning of the sea day on the 30th, it came fresh from the northwest; the 30th (sea day), opened with a wind fresh from the northwest and with the barometer 29.77. During that day the wind shifted from northwest to north-northwest and north, and late in the day to north-northeast, the barometer being at the beginning of the sea day 29.77 and the wind
137 northwest. The barometer fell during the day and on the beginning of the following sea day was 29.58. From the movements of the wind and the barometer what would you judge as to the approach of bad weather?
A. What is it previous to 29.77?
Q. It had been 29.58 the day before?
A. I should think nothing very serious was going to occur anyhow, with that movement; I shouldn't think there was anything very bad; I should think the worst was past.
Q. It appeared that during the latter part of the sea day of the 31st there was a violent storm and that at the beginning of the sea day of the 31st the wind was north-northeast and the barometer 29.58, the wind shifted from north-northeast to north, and the barometer fell in 23 hours from 29.58 to 29.21, and that during that day there was a storm which approached a hurricane in force, the seas being from the north-northeast and another sea from the northwest. With the wind coming from the north-northeast and north, and heavy seas from the north-northeast and from the northwest, and in the prevalence of a severe storm, what would be the proper heading of the vessel?
Q. That is a great deal according to the power of the vessel. If

the vessel is powerful enough to hold her course with the wind north-northeast, it might be advisable. If, on the contrary, she is a small ship, the proper way is to stop her engines——

Q. Heading in what direction?

A. Lie about east-southeast, and then have the northwest sea on the quarter—the heaviest sea that you can have.

Q. And take the wind and heavy sea on the port quarter?

A. On the port quarter. You have not got to try to get out of the storm; there the storm is done, pretty near, you have had it, you have got it.

Q. It has been stated that it would be better to lie hove to on the starboard tack. What have you to say about that?

A. The question is what do you call heaving to on a steamer? The only way to heave a steamer to, a small-powered steamer, is to bring her quarter to it.

Q. Bring her quarter to it?

A. Bring her quarter to it.

138 Q. And not her bow?

A. And not her bow. She won't lie with her bow.

Q. How would it be with a sailing vessel?

A. A sailing vessel would lay end on to it. She would lay with the wind about six or seven points; and then you would lay the ship on the starboard tack, if she was a sailing vessel.

Q. If she was a sailing vessel she would lie on the starboad tack?

A. Yes.

Q. But with a steamer, with the wind and sea as I have described, you would lie so she would take them abaft the beam on the port side?

A. Yes, and bring the northwest sea on the port quarter.

Q. And the wind and northerly sea?

A. A little abaft the beam.

Q. On the beam or a little abaft the beam?

A. A little abaft the beam, to bring the biggest sea aft.

Q. You have spoken of vessels of high power. What would you say as to a vessel of the class of the *Hugo?*

A. I should think she was only small-powered; she wouldn't be able to head a heavy sea; she wouldn't have to do that; she would have to stop and let the sea take her quarter. She is really hove to.

Q. That is what you would call heaving to with a steamer?

A. Heaving to with a steamer.

Q. Why is it that you put the quarter of the steamer to a storm and sea instead of the bow?

A. Because the bow wouldn't stay. There is the propeller aft, and that acts as a drag and holds the stern up to the sea, just in the opposite way that a sailing ship would lay. If you hadn't a propeller there she would lay with her bow, and that propeller stopped acts as a drag and just keeps her heading the sea with the sea on her quarter, she would just lay there.

Q. Why wouldn't it be better, if she was heading that way, to

the east-southeast, or in that direction, for her to keep up her speed and run off before the wind and the seas instead of stopping?

A. There would be a great deal of danger in it. She is very liable, if it is a very heavy sea and her going before it, she is
139 very liable to take a sea over the stern and sweep everything, especially a ship like the *Hugo* or any small-sized ship—narrow ship.

Q. It appears that in this case, during the prevalence of a storm, she headed part of the time south 65° east, part of the time southeast one-quarter east, and part of time east-southeast. What do you say as to that heading?

A. I think the heading is correct.

Q. And her engines were practically stopped during that time?

A. Practically stopped; with the wind as it had been and the wind that was and the seas, she would lay better that way with her engines stopped and the port quarter toward the sea. It is the best way she could possibly be put.

Q. What do you say as to the practicability of steamers entirely avoiding storms at sea by changing their course?

A. I do in theory, but I don't think I do in practice.

Q. Is it done in practice?

A. I don't know; I never see it.

Q. Can you, from observations of the barometer and wind, determine exactly the course of approach of a storm?

A. In my experience, no. There is a rule of storms, there is a law of storms, but they don't always work. Sometimes it may work according to this law of storms; other times no.

Q. The exceptions are numerous?

A. The exceptions are numerous.

Q. Is it advisable or practicable, in your judgment, to endeavor to navigate a steamer according to this general law with the idea of avoiding storms?

A. No; not across the Atlantic.

Q. Can you be sure of avoiding a storm by any means of navigation?

A. I don't think you could; it is just according to how far you get into the storm.

Q. Do you know whether there is any practice or custom among navigators of steamers to endeavor to avoid storms by changes of course?

A. No, sir; not in the Atlantic ocean.

Cross-examined by Mr. PARKIN:

140 Q. I suppose the falling of the barometer is usually an indication that the storm is approaching you, is it not?

A. Well, it is; not always, though. You see a barometer works a good deal by the wind, and you can have a very, very low barometer without any wind.

Q. But if you find the barometer rapidly falling you generally assume that the storm is approaching you, do you not?

A. Yes; but when you get in the position where it is rapidly falling you can't get out of the way of it anyhow, and the question is to keep as you are going till it passes.

Q. There are regular rules laid down in books of navigation for avoiding storms, are there not?

A. I believe there are, and would be used and taken notice of perhaps twenty years ago; not at the present day.

Q. Recent books you don't think lay down any?

A. Yes; they are laid down, but they are written by a man fifty years ago, and I don't think people take any notice much of them now.

Q. If you found that your vessel was taking the seas over the port side and that they were washing the decks, and you had a deck-load of cattle on board your steamer, would you not endeavor to bring the bow of the steamer towards the seas?

A. The bow of the steamer to the sea? There are two seas. Which sea are you going to bring the bow to? You have got a northwest sea and you have a northeast sea or a northerly sea. Whatever way, if you put your bow to the northwest sea you are going to have the northeast sea on your side, and then the steamer may not have power sufficient to head that sea, and then she would fall off in the trough of the sea and make it worse. The only way with the steamer is to stop your engines and let her lay with her quarter to it, and she will lay in the easiest position she can possibly be put.

By Mr. MacFarland:

Q. Is that true of all steamers?

A. That is what I do carrying cattle. If I had no cattle to protect I go ahead all I can.

141 Q. Would it be true of all steamers carrying cattle?

A. Yes.

By Mr. Parkin:

Q. You mean to say that is the regular course with all cattle steamers in a storm, to let them lie with their sterns or their quarter to the seas?

A. Not always. It is supposing that the wind is in the position you can't make your course; the wind is north-northeast.

Q. Supposing that you decide that you can't make your course; is it then the common practice with all steamers carrying cattle to let the vessel lie without heading at all to the seas?

A. Stop the engines and let the seas come on the quarter.

Q. Do you know that to be the practice with all steamers carrying cattle?

A. That is the practice with myself and what I have heard others speak about. It is the only possible way you can do if your steamer won't head the sea; that is the only thing you can do. You heave her to with the wind on the quarter; the propeller acts as a drag to keep her up to it.

By Mr. MacFarland:

Q. Supposing a steamer will head in the seas, is it a proper thing to do?

A. A great deal depends upon circumstances.

Q. Ordinary circumstances?

A. If the wind and the sea is right in the direct way of your course you would head the sea, if the ship——

Q. I understand you to say that if a vessel laden with cattle encounters a storm that requires it to do the best thing it can for safety, that if it can head the sea it is the best thing to do?

A. No.

Q. You do not say that?

A. No, I do not say that.

Q. And you think it is better to let her lay in the trough of the sea?

A. Not in the trough, no, sir; if you bring the sea on the quarter.

Q. That is under all circumstances the proper thing for a steamer to do, laden with cattle caught in a storm?

A. That is the easiest way you can lay a ship; you are laying her to.

142 Q. Then you don't think it would be proper to head the sea, that her bow should be put to the sea?

A. There is a difference——

Q. You say no?

A. I say no, in this ship.

Q. The last statement is intended as a general proposition in navigation?

A. General, yes.

Q. So that, assuming that a particular steamer could be manœuvred with relation to the movements of the storm in such a way that her head would be always to the sea, it would not be the proper manœuvre?

A. The ship would lay easier with her quarter to the sea.

Q. That is equivalent to saying that the manœuvre I have suggested would not be the proper one?

A. That is the easiest way you can lay the ship for the safety of cattle.

Q. I merely mention this as a basis for an expert opinion from you. Do you know the steamship *Wells City?*

A. I only know her by name, sir.

Q. You don't know the captain of the *Wells City?*

A. No.

Q. Supposing we were to say, in the way of testimony, he was carrying a load of cattle on deck and was, in point of fact, delayed, some considerable delay, by the storm, having to stop, and having stopped and laid during the period of stopping with the ship's head straight to the wind. You would regard that as bad navigation?

A. But he couldn't be stopped with the ship's head to the wind.

Q. Then you would say he could not have done that?

A. I would say that he couldn't be stopped and lay with the ship head to the wind.

Q. Why not?

A. She wouldn't lay; the ship would not lay.

Q. Why not?

A. The propeller acts as a drag.

Q. Then when she was disposed to fall off couldn't she be manœvred up so as to keep her practically to the wind all the while?

A. You would have to go ahead all the time to keep her head to the wind. You would never have to stop to keep her head to the wind.

143 Q. As Mr. Parkin suggests, you could keep the screw turning slowly, couldn't you?

A. Then you wouldn't stop.

Q. You could approximately stop, keeping the screw turning slowly?

A. That depends on how much wind there is. With a ship like the *Wells City* she would have to go ahead full speed to keep her head to the wind, and then perhaps she wouldn't be able to do it.

Q. Supposing you say it couldn't be done, and you say it couldn't be done because the ship would fall off, now you say whether the ship would fall off or not depends upon the strength of the storm?

A. I maintain that if the ship is stopped, I don't care how much storm, she won't lay head to the wind.

Q. Do you go as far as to maintain that moving the screw slowly, if practicable, wouldn't have a tendency to keep her up in the wind?

A. Would have a tendency. But it would all depend upon the strength of the wind whether she would do it or not.

Q. And the extent to which it would be done would depend upon circumstances and character of the storm?

A. Yes.

Q. But if it could be done, I understand you not to disapprove that method as a judicious one?

A. It is greatly according to what ship you are in going head to a storm. A big, powerful ship like mine would go head to the storm and perhaps might make very bad work of it. But in the event of the storm getting that bad, and I have seen it that bad in my ship, and she is making very bad work of it, then I would stop the engines and bring her quarter to it.

Q. But if she could stand it——

A. If she could stand it and I was drawing my course and everything was going all right, I would certainly do it. But the storm has got to be just in my track.

Q. And certainly then you would make your course as well or as fast as you liked?

A. I would have to go full speed to keep her head to the wind.

Q. I have understood you to say that whether you would have to go full speed or not would depend upon the violence of the storm?

A. I don't call it a storm if I could go slow and head it.

144 Q. Did you ever put your steamer's head to the sea in a storm?

A. Do it every voyage pretty near, every winter trip pretty near,

I do do it; that is, if the storm is in my track. If I am bound west and the wind is west, I put her head to it as long as she will go.

Q. And when you do put her head to it the seas don't come over the bow, do they?

A. Oh, yes.

Q. I don't mean the bow. I mean the sides.

A. Not if I am end on, it won't come over the sides; it will come over the bow.

Redirect by Mr. MYNDERSE:

Q. In the prevalence of a severe storm, must the navigation of a vessel depend much upon the character of the vessel, the force and direction of the wind, and the force and direction of the seas, especially if they are cross-seas?

A. Everything depends upon the class of vessel.

Q. Much must be left therefore to the judgment of the navigator?

A. Of the commander.

Q. And I understand you to say that when you do put your head to the sea to meet a storm, you have to continue to the full power of your engines, and that when you can no longer meet the storm, you turn and lie with your quarter to it?

A. As a rule.

Q. And then you are lying hove to in the acceptation of the term?

A. Lying hove to, stern to, the same as a sailing ship will lie hove to.

By Mr. MACFARLAND:

Q. Then are we to understand you as saying that really you can't put your steamer head to the wind and keep her there without using the full power of your engines; is that what you mean to say?

A. I mean to say that, yes, if it is a heavy wind that is blowing.

By Mr. MYNDERSE:

Q. The extent to which you use your engines in order to lie head to the wind depends upon the course of the storm?

A. The storm.

145 By Mr. MACFARLAND:

Q. Then you do not mean to say that you can't lie with the ship head to the wind without using your full power of your engines?

A. My ship won't do it. You might with a mail boat. It is according to the class of ship.

U. S. District Court, Southern District of New York.

WILLIAM W. BRAUER *et al.*
against
COMPANIA DE NAVIGACION LA FLECHA.

NEW YORK, *February* 13, 1893.

Appearances: Mr. Mynderse, for respondent; Mr. Parkin, for appellants.

Mr. Mynderse states that he objects to any testimony being taken at all on behalf of the libellant-, on the ground that the libellant-*has* rested *his* case; that the case has been set for argument without any leave for the libellant- to take further proof, and further, being advised that a witness is to be called as an expert navigator, he objects, without waiving the previous objection, that such testimony is not admissible on surrebuttal, the libellant- having gone into this subject and closed *his* case upon this point.

HORACE W. BARCLAY, being duly sworn, and examined as a witness for the libellants, testifies:

By Mr. PARKIN:

1 Q. Captain Barclay, you are the captain of the steamer *Llandaff City*, I believe?

A. Yes, sir.

146 2 Q. How long have you held a master's certificate?

A. Twelve years, about.

3 Q. How long have you been master of the *Llandaff City?*

A. Five months—four months.

4 Q. Have you also served as mate of the *Llandaff City?*

A. Yes, some time ago.

By Mr. MYNDERSE:

5 Q. When do you go to sea, Captain?

A. Wednesday, midday.

By Mr. PARKIN:

6 Q. Before you were master of the *Llandaff City*, what steamers were you in?

A. On the same line I was master of the *Brooklyn City* for about three years.

7 Q. Those vessels carry cattle, I believe?

A. Yes, sir.

8 Q. And they carry them on the upper deck?

A. Yes, sir.

9 Q. When you have a deck cargo of cattle, and find yourself getting into a storm, you have, I suppose, to be rather more careful in the navigation of your vessel than if you have no deck cargo?

A. Yes, sir.

10 Q. Supposing in proceeding from New York to Liverpool, with a deck load of cattle, you find yourself running into a storm, with a

heavy sea; that the sea is coming on board, breaking the cattle pens as long as you keep on your course; that the wind and the seas are from the north-northeast by the compass, and that your compass course for Liverpool is south 65 deg. east: what, under those circumstances, would you do with your vessel?

Objected to as a hypothetical question and not containing all the material facts.

A. Probably I should keep the vessel off either up to the sea or off before it, according to circumstances.

11 Q. Now, supposing the wind and seas had been first blowing from the northwest: that they then changed from the north-
147 west through the north to the north-northeast; at nine o'clock in the morning were blowing from the north-north-east, and continued so until two or three o'clock in the afternoon; the wind increasing in force all the time; at that time, at half past two, you find that the seas are coming on board on the port side of your vessel and breaking the cattle pens; what then would you do with your vessel?

A. I should do the same as before, probably; I should alter the course so as to ease the ship; in all probability I should keep her off more; the probability is I should keep her off before the sea.

Same objection as before to the above question.

12 Q. If you kept her off before the sea, how far off would you keep her under those circumstances?

Same objection.

A. I should want to keep her off as little as possible, and I should try to find that out from experiment; for instance, I should say to the steersman, Alter the course another point and see how she lay; and if that was not sufficient I should keep her off still further until I got her right before the sea; I should keep as near the course as possible.

13 Q. Under those circumstances would you or not stop your engines?

A. No, I should not stop the engines.

14 Q. You would keep your engines moving all the time?

Same objection.

A. Yes, sir; I would keep the engines moving all the time.

15 Q. If the seas continued to increase in violence, what then would you do?

Same objection.

A. I should probably—supposing she was not as far off as
148 she could be, I should probably keep her dead before it if the seas were breaking aboard and damaging the cattle pens and killing the cattle.

16 Q. You would then keep her dead before it?

Same objection.

A. Yes; if I considered it to be dangerous.

17 Q. Now, supposing that you found that then, keeping dead before it, the seas were still coming on board, what would you do?

A. I should probably heave the ship to, head to the sea, and try it in that way.

Same objection to the above question.

18 Q. Now, supposing the seas had been coming from the northwest, the wind fresh from that direction; the wind then shifts through the north to the north-northeast; after it has been blowing from the north-northeast with increasing violence for several hours, say six hours or more, what effect would that have upon the seas which had previously been coming from the northwest?

Same objection, and as incompetent.

A. Probably it would be greatly diminished; if not, entirely destroyed.

19 Q. Supposing the wind has been blowing from the northwest and the seas are coming from the northwest; the wind then shifts to the north-northeast through the north, and at nine o'clock in the morning is blowing fresh from the north-northeast; it continues to blow so during all of that day; at two o'clock in the afternoon you find the seas come on board the vessel, breaking the cattle pens; would you, under those circumstances, consider it proper to stop the engines and let the vessel lie with her head southeast a quarter east?

Same objection. Objected to as incompetent, and as a hypothetical question not containing all the material facts.

149 A. I can't imagine, under those circumstances, that the ship would lay safely; of course if she would, it would not be necessary to do any more; but I can't imagine that she would lay safely.

20 Q. Is it not the fact that, as a rule, the dangerous seas are those which come with the wind, after the wind has been blowing in one direction for some hours?

Same objection.

A. Yes.

21 Q. Supposing the wind has been blowing from the northwest, the seas are coming from the northwest. The wind then shifts to the north, and finally to the north-northeast, and blows with increasing violence for some hours from the north-northeast. The seas still continue to come from the northwest and from the north-northeast, and you find that the seas are coming on board the vessel and breaking your cattle pens, you then stop your engines, and the vessel lies southeast a quarter east; you find that with her lying so the waves come on board on the port side and break the cattle pens. Under those circumstances, what would you do with your vessel?

Same objection.

A. I should keep her off more.

22 Q. How far off would you keep her?

Same objection.

A. Probably I should keep her from south by east to south-south-east.

23 Q. How many points abaft the beam constitute broad on the quarter?

Same objection.

A. Four points from the beam, midway between the end and right on the side, 45 degrees.

24 Q. I understand then from your testimony that, in your
150 opinion, there are practically only two things to do when you find the waves are coming on board and breaking your cattle pens, either to keep the vessel moving and keep her off before the seas as far as is necessary to stop the waves from coming on board, or else to heave her to and bring her head to the seas?

Same objection.

A. Or else head to the sea and reduce her way as much as possible to keep steerageway on the ship; also you would set sails no doubt and do a few other things.

25 Q. In your opinion, also, it is bad management of a vessel to stop her engines and let her lie without any headway when you find that in that position the seas are coming on board and breaking your cattle pens?

Same objection.

A. Yes, certainly; if you find that she is making bad weather, you want to try to do something else.

26 Q. Is there any difficulty in keeping a steamer head to the seas when her engines and screw are in proper condition?

Same objection.

A. Sometimes, under certain circumstances, depending on the trim of the ship, the ship would not lay to well, but not as a general rule. If you can't do that, of course you keep her away before the sea.

27 Q. How long is the *Llandaff City?*

A. 280 feet.

28 Q. What is her nominal horse-power?

A. 200.

29 Q. Is there any difficulty whatever in keeping that vessel head to the sea?

Same objection.

A. I have never found any.

30 Q. Now, we will assume that the vessel is proceeding from New York to Liverpool, her compass course south 65 degrees east, at one o'clock midday, the wind is blowing from the north-
151 west, and has been blowing from that direction for some time, and the seas are coming from the northwest; during the night the wind changes to the north-northwest, towards morning to the

north, and at nine o'clock in the morning is blowing from the north-northeast; the vessel still keeps on her course, and the wind continues to blow from the north-northeast until after two o'clock of that day; finding that the seas are coming on board and breaking the cattle pens, the vessel is stopped and she lies with her head southeast a quarter east; the seas still come on board and break the cattle pens; she is left in that condition; at five o'clock the next morning the wind has shifted to the north again and the vessel then lies headed east-southeast, and the wind continues to blow from that direction, and the vessel to head in the direction indicated.

Same objection.

A. I should have kept the ship off before the sea. When the wind shifted to the north-northeast I should have kept her more off, that is practically right astern, right away from the sea. When the fresh sea begins to rise you want to keep her still further off.

31 Q. You would then consider it bad management to leave the vessel in that condition?

Same objection.

A. Certainly if the ship was making bad weather and seas were breaking aboard.

31½ Q. The vessel of which we are speaking had a deck-load of cattle, the cattle being arranged on both sides, some amidships, but no cattle in the waist of the vessel, the cattle being some of them in the stern and some in the bow, and the vessel having a turtle-back over her bow, the seas all the time increasing, and the wind increasing in violence; under those circumstances what would you do?

A. The same as before, either keep her more off before the sea or heave her to, as my probable knowledge of the ship would lead me to suppose she would do the best.

152 32 Q. And under any circumstances, whatever you did, you would keep your engines moving and steerageway upon her?

A. Yes, decidedly so; unless she would go without the engines moving, as some ships might do.

33 Q. But if you put her before the seas you would keep the engines moving?

Same objection.

A. Yes, sir.

Cross-examination:

Mr. MYNDERSE: Without waiving my objections to the taking of the testimony, or any of the other objections noted, I will ask the captain a few questions.

1 X Q. How old are you, Captain?

A. 38.

2 X Q. How long have you been in steamers as master?

A. About three years and a half.
3 X Q. Your experience is confined to the *Brooklyn City* and the *Llandaff City?*
A. Oh, no;—as master, yes.
4 X Q. Are you regularly engaged in the transportation of cattle?
A. Yes.
5 X Q. How often have you carried cattle?
A. How often have I carried cattle?
Q. Yes.
A. About twenty times at a guess.
6 X Q. Have you ever lost any?
A. Yes.
7 X Q. Had some pretty serious losses, haven't you?
A. No.
8 X Q. How many do you carry at a time?
A. 150 to 160.
9 X Q. On deck?
A. Yes, all on deck.
10 X Q. What is the most you have lost?
A. Four, on account of bad weather.
11 X Q. How many is the most you have ever lost?
A. 14 out of one lot.
12 X Q. Where does the steamer run—between what ports?
A. Between New York and Bristol.
13 X Q. Do you know the steamer *Bovick?*
A. No, I don't know her, only by name.
153 14 X Q. Do you know that she is engaged largely in the transportation of cattle?
A. No; I did not know it.
15 — Q. Do you know what fleet she belongs to?
A. I don't know; she is under the Spanish flag; that is all I know.
16 X Q. The *Bovick?*
A. Yes. Is that wrong?
17 X Q. Yes.
A. I was under that impression.
18 X Q. She is one of the White Star boats, isn't she?
A. Oh, yes; certainly she is. I was thinking of another vessel. Now I understand what ship you mean.
19 X Q. I am not talking about the *Hugo;* I am talking about the *Bovick.* You know the *Bovick* is engaged in the carrying of cattle?
A. Yes, sir.
20 X Q. Very largely, isn't it?
A. Yes; she is a regular cattle ship.
21 X Q. A regular cattle ship?
A. Yes.
22 X Q. Carrying a thousand to twelve hundred cattle at a time?
A. I believe so.
23 X Q. And she carries on all decks, including the upper deck, the upper and main deck she carries?

A. Yes, sir.

24 X Q. Have you ever been, Captain, in a serious storm at sea?

A. Yes; a great many.

25 X Q. And in occasions where you had to exercise your own judgment as to the best navigation of your vessel?

A. Frequently.

26 X Q. When you have come ashore have you ever talked over your experience in those storms with other mariners?

A. Occasionally; not very often.

27 X Q. And whose opinion would you go by in the matter of the navigation of a vessel—your own or that of these persons that you talked with after you came ashore?

A. Decidedly my own.

28 X Q. The master of a vessel is the only one that can determine the right thing?

A. Yes; of course.

Redirect examination by Mr. McFARLAND:

1 Re-D. Q. So far as you know, are the rules of navigation
154 which you say you would yourself have followed under the circumstances described by you followed by navigators in general?

A. Yes.

2 Re-D. Q. They are?

A. Yes.

3 Re-D. Q. Are they well-known and simple rules of navigation?

A. Certainly. The dangerous point for a sea—that is a question you have not asked me.

4 Re-D. Q. Where is the more dangerous point for a sea to come on a ship?

A. On or near the beam.

5 Re-D. Q. And I suppose one thing to be especially guarded against with a load of cattle on board is the trough of the sea?

A. Yes; certainly. That is it; you want to keep the ship out of the trough of the sea—that is, off the beam as much as possible—especially because the ship rolls so badly; she would throw the cattle about and break their legs, etc. Sometimes you will hear of cattle being thrown right across the hatches, from one to the other.

United States District Court, Southern District of New York.

BRAUER
vs.
LA COMPAGNIE DE NAVIGACION LA FLECHA. } Before Hon. Addison Brown, Judge.

NEW YORK, *April* 13, 1893.

NESTOR PONCE DE LEON, sworn and examined as a witness for the respondent.

By Mr. MYNDERSE:

Q. You reside in New York?

A. I do.

Q. Where were you born?
A. In Havana, Cuba.
Q. What is your native language?
A. Spanish.
Q. Your profession is what?
A. Lawyer.
155 Q. Will you please state your age?
A. I am fifty-six years of age.
Q. You combine with your profession as a lawyer what other?
A. Notary public and translator.
Q. You translate what languages?
A. Spanish, English, French, Italian, Portuguese.
Q. And what class of documents and papers?
A. Legal documents of any kind.
Q. Have you seen this log of the steamer "*Hugo*," Respondent's Exhibit B, before? (Showing book to witness.)
A. Yes, sir.
Q. I show you the words in writing, facing page 48, as follows: "atraversados al viento y mares," being in the 8th line of the writing, and I have marked them with the letter Z. Will you please tell me the meaning of those words?
A. They mean lying to the winds and seas.
Q. That same expression occurs in different places on the log, does it not?
A. Yes, sir.

By the COURT:

Q. And do you give it the same translation in each place?
A. Yes.
Q. Is "atraversados" a compound word?
A. No; that is a single word.
Q. Signifying lying to?
A. In this case—in this context it means lying to.
Q. Is this a part of a sentence, or is it a complete sentence by itself?
A. It is a part of a sentence. It says: "Stopping here and will remain lying to the wind and seas."

The COURT: I think the witness better translate the whole clause.

Q. Suppose you translate two or three words before and after, so as to translate the context?
A. "Making the ship work terribly. Some of the hatches by hatchway No. 4 were destroyed"—or "broken to pieces."
Q. You mean those are different translations—destroyed or broken to pieces?
A. Well, it is the same thing—destroyed or broken to pieces.
156 I suppose "broken to pieces" is the best. "And some of the cattle went free. We stopped the engine, and remained lying to the wind and seas."
Q. Is there a period after the word "seas"?
A. No, sir; there is not a single punctuation-mark here at all.

Q. Does that begin a new phrase, as you understand it?
A. Yes, sir.

By Mr. MYNDERSE:

Q. Have you any books or dictionaries showing the derivation or the meaning of this word "atraversados"?

The COURT: That is the word that is in dispute, is it?
Mr. MYNDERSE: Yes, sir.

A. Yes, sir. I have here a dictionary of maritime terms, entitled "Diccionario Maritimo Español," published at Madrid in 1864, by the hydrographical department of Spain.
Q. And is the word "atraversados" found there?
A. Yes, sir.
Q. Won't you translate what it says there, "Atravesarse, v. r. *Man.*"?
A. It means verb reflective

By the COURT:

Q. What does the "Man." mean?
A. That means relating to manœuvre or manœuvring. The definition in general is to place the ship with the sides perpendicular to any direction whatsoever.
Q. That is your interpretation—"putting the ship's head to the wind"?
A. Yes, sir; or in another form, to lay to until the sails flap. All this was expressed in ancient times by the phrase "To place oneself with the sea abeam," although more generally it was understood to lay to or put oneself by the head—that is, to lay to in a tempest. Then comes the French word there, which is equal to bringing to, to lie to.
Q. Is there any significance in the words from which "atraversados" is derived, showing the angle at which the lines cross?
A. In common language, yes; but not in nautical language.
157 "Atraversados" means to place anything crosswise; that is, in common language, but not in nautical language.

The COURT: I think the trouble is that it does not tell how much crosswise it is, and therefore it may be used for both. It is a question what precise technical language usage may make it to mean.

By Mr. MYNDERSE:

Q. Do you produce any other dictionary?
A. Yes, sir; I produce a book called "Diccionario Marino Español-Ingles," being a marine dictionary from Spanish into English, published in Madrid in 1849, by order of the Spanish government. At page 30 I find the following: "Atravesado (estar). Lying to (V. Facha)—*Estar atravesado al viento.* To have the wind athwart."
Q. Have you yourself edited a Spanish-English dictionary of technical terms?
A. I have.

Q. That is, of words employed in sciences, arts, navigation, architecture and so on?

A. Yes.

Q. Does the word "atravesado" appear in that?

A. I think it does.

Q. Will you look, and then state what signification you give to it.

A. Page 87: "Crossed, crosswise, cross-barred, traversed (mar.), lying to." That "mar." in parenthesis means mariner—the mariner's meaning of it.

Q. Will you translate for me the first line of the writing, opposite page 51 of the log, especially the words "el aparejo aferrado"?

A. That means: "We began this day's run with the machine (or engine) stopped, and the sails furled, with hurricane, wind and seas."

Q. The words "el aparejo aferrado" you translate as "the sails furled"?

A. Yes, sir; that is what it means in this case.

Cross-examination by Mr. MacFarland:

Q. Although I used to know something about the Spanish language and Spanish countries, I do not profess to know anything now about Spanish, and do not fancy that I do. However, I do not think we shall disagree. What we chiefly wish to find out is the true meaning in this log of the words "kadendo atraversados al viento y mares"? 158

A. I have just made a translation for the judge. It means lying to the winds and seas.

Q. You agree with me that "atraversados" means that it comes from the word "atravasar"?

A. Yes, sir.

Q. We agree so far?

A. Yes.

Q. What is the standard English-Spanish dictionary—Sones'?

A. No, sir; the best is Robinson & Bentley's

Q. Sones' is a good one, isn't it?

A. A pretty bad one—so much so that it has been corrected three times.

Q. How about the last edition; it that a good one?

A. No, sir; not in my opinion.

Q. It is used more or less, isn't it?

A. Yes, sir.

Q. That dictionary says the word "atravesado" means to lay abeam, a piece of timber, or plank athwart a place. Is that wrong?

A. I cannot say exactly; but I place no reliance whatever upon that dictionary. It is conceded to be a very bad dictionary.

Q. You do not assert that that definition is wrong, do you?

A. No, sir.

Q. If it is correct, it would mean like laying my pencil across that book, wouldn' it (illustrating)?

A. No, sir; not like that. It means——

Q. I am not now asking you what "atraversados" means. I am

asking you if what this dictionary says is right. To lay abeam, a piece of timber or plank athwart a place. You know what that word athwart means?

A. Yes, sir. That is one of the meanings of the word.

Q. And if that is the true meaning in this log, then it would mean like my laying this pencil across this book, wouldn't it?

A. No, sir; and I will tell you why: Because the meaning of the word *athwart* there is not the meaning of the word in nautical language.

159 Q. If you assume that what this dictionary says is right——

A. I say that I do not know whether it is right or not.

Q. But assuming that it is right, then athwart means across, doesn't it?

A. Sometimes.

Q. If it means across, then it would be the position which I indicate by my pencil (illustrating)?

A. I have answered you what is right, and I think you cannot oblige me to answer yes to a thing that is not right.

Q. I am supposing that the word "athwart" means across—does it so mean?

A. I suppose it does.

Q. Does my pencil lay across that book now (illustrating)?

A. Yes, sir. That is one of the meanings of the word, and I qualify my answer in this way.

Q. "Atraversados" is what—a participle or a preposition or an adjective?

—. It is a participle, but is also used as an adjective.

Q. "Kadendo" comes from the word *kada?*

A. Yes.

Q. That means to remain?

A. Yes, sir.

Q. A present participle?

A. Yes, sir.

Q. Does the word "athwart" mean in Spanish, "de un modo atravesado"?

A. Yes, sir.

Q. Does "de traves" or "al traves," mean across?

A. Yes, sir; and also *through*, and it means also *to strand a ship*; it has many meanings.

Q. Does "por el traves" mean on the beam?

A. Yes, sir.

Q. Then "por el traves de Margate" would mean abreast of Margate?

A. I would not say that, because that would not be Spanish. That would be absurd.

Q. Wouldn't it mean abreast of Margate?

A. I don't know what it means in Spanish. Whether there is a place called Margate or not; I do not know.

Q. Do you know what it means?

A. Not in this case.

Q. Do you know what it means in Spanish—it means abreast doesn't it?

A. Yes, sir; but we never say abreast of a place or of a street.

160 Q. So if you find the illustration in a dictionary you would say that was a bad dictionary?

A. To be sure I would. I should say it was a very bad illustration.

Q. Do the words "viento por al traves" mean wind on the beam?

A. Yes, sir; wind on the beam.

Q. You say you are accustomed to the nautical use of words, and I have no doubt you are thoroughly familiar with them, are you not?

A. I am.

Q. Then I suppose you agree that athwart in nautical language means across the ship's line?

A. Yes, sir.

Q. That is to say, from side to side of the ship?

A. Yes, sir.

Q. The words in question have been already translated as follows: "We commenced this day with the engines stopped and the rigging taut, with hurricane. The vessel crosswise to the wind and seas." Is that wrong?

A. Yes, sir; it is entirely wrong.

Q. So the vessel was not crosswise to the wind and seas?

A. The vessel was placed lying to, to resist the tempest.

Q. Then the vessel was not lying to crosswise to the wind and seas?

A. I was not present.

Q. You say from the language of the log that the vessel was not lying crosswise to the wind and seas?

A. Not lying crosswise, but was lying in a position to resist the wind and seas.

Q. You say it was not lying crosswise to the wind and seas?

A. That is my opinion.

Q. Was the vessel lying with her head to the wind?

A. I cannot say, because I was not present.

Q. Does the language there mean that the ship was lying with her head to the wind?

A. With the stem or stern to the wind; I don't know which. I suppose it was trying to prevent the wind from——

Q. I do not ask you what you suppose it was trying to do?

A. Then why do you ask me how the ship was lying?

Q. I am asking you what these words mean.

A. I must make my supposition from the words there.

161 Q. You say the words do not mean what this translator says they mean—you say that it does not mean crosswise?

A. No, sir. It means that the rigging was taut. It means there that the sails were furled.

Under the head of "atravesados" the definition is as follows: The wind atravesado, the same as "athwart" "on the beam" or at

eight points; that is to say, a wind whose direction forms a right angle with the keel.

MICHAEL CARMONA, being duly sworn and examined as a witness for the libelants, testifies through an interpreter:

By Mr. PARKIN:

Q. Where were you born?
A. Malaga.
Q. What is your native language?
A. Spanish.
Q. Of what steamer are you the captain now?
A. The *Ciudad Condal.*
Q. To what line does that steamer belong?
A. The Spanish Transatlantique.
Q. That is one of the Royal mail steamers, is it not
A. Yes.
Q. Ceballos & Co. are the agents in this city?
A. Yes.
Q. How long have you been captain of her?
A. Twenty-two years.
Q. We find in the log of the *Hugo* the words "quedando atravesados al viento y mares." Will you take a pencil and piece of paper and show us by a diagram the direction in which the wind and seas would be coming to the vessel?

(The witness puts the model at right angles to the wind and says this is atravesados. The straight lines represent the waves and the arrows represent the direction of the wind. Also indicates a position called lying to.)

By the COURT:

Q. With a sail vessel?
A. Yes, with both sail and steam.

162 By Mr. MACFARLAND:

Q. Lying to then is the reverse of atravesados?
A. Yes.

By the COURT:

Q. Suppose that is a sail vessel. Will you put her in the position of lying to as exactly as you can?

(The witness places the model and says that is it.)

Q. How many points is it?
A. Six points. (The position is marked on the diagram "E.")
Q. How much is the angle between the bow of the ship and the wind in points?
A. The interior angle is 60 degrees.
Q. Which angle do you refer to?
A. I make the angle between the wind and the keel of the vessel.

(The witness puts the models in a way to indicate in fact about two points and calls it six points and 60 degrees, and repeats the same thing, and says:

In sailing vessels they have to use their judgment, according to the vessel; sometimes it is ten degrees, more or less.)

Q. Making a right angle?

A. 90 degrees.

Q. What do you estimate the angle between that line?

A. 24°.

Q. Do you mean to be understood that you estimate that angle to be 66° and that angle 24°?

A. Yes.

Q. Have you ever commanded vessels or been an officer on sail vessels?

A. Captain.

Q. How long?

A. In one vessel I was eleven years and ten months.

Q. How was she rigged?

A. Bark-rigged.

Q. How near could she sail to the wind?

A. Five points.

Q. When you are lying to in a gale do you lie nearer to the wind than when you are beating?

A. Yes.

Q. Do you not then, when lying to, lie within less than five points of the wind?

A. Yes.

163 Q. Why do you place the position of lying to six points instead of less than five then?

A. Because I make an average; sometimes a vessel goes six points and other times it is four.

Q. The average of six and four would be five, and that would be exactly how she beats?

A. Five or six; the vessel in that case is not moving.

By Mr. PARKIN:

Q. We find in the log these words: "Atravesados al viento y mares dando el buque fuertes balances." Will you tell me what the word "balances" signifies in that connection?

A. Rolling.

Q. Rolling from side to side?

A. Rolling one side to the other.

Q. What would be the special term that would be used for the log to indicate that the vessel was pitching with her bow to the seas?

A. "Cavecio."

By the COURT:

Q. Do you understand the expression "quedando atravesados al viento y mares" has the same signification as "viento atravesados?" Does "atravesados" have identically the same meaning as when you say "viento atravesados"?

A. Yes, sir; it has the same meaning.
Q. Does "al viento" mean "to the"?
A. Yes, sir.
Q. What phrase do you use for the log to indicate to "lie to in the gale"? I ask you to write the phrase "We lay to in the gale."

Mr. Mynderse objects, that the interpreter in translating the question must put the words in the witness' mouth.

A. My idea is that the word is "capiendo." I am not positively sure of the translation.
Q. That does mean the whole thing?
A. It means all. It means lying to the wind and lying to the seas.
Q. What is the expression for "the ship lay to in the gale"?
A. I wouldn't use any more than the word "capiendo," for
164 I would have already described above that it was a hurricane and the way the vessel was meeting the seas.
Q. Will you write in identical language "We put the vessel with her head to the wind and seas"?

The same objection.

A. "Capiendo."
Q. Suppose you were writing a letter and wished to say that you were having a heavy gale and the ship lay to.
A. "Capiendo el huricano." The word "capiendo" in itself implies that there is a tempest or a hurricane, because otherwise they would use the word "infatus."
Q. Write in Spanish this expression: "We sailed with the wind abeam."

The same objection.

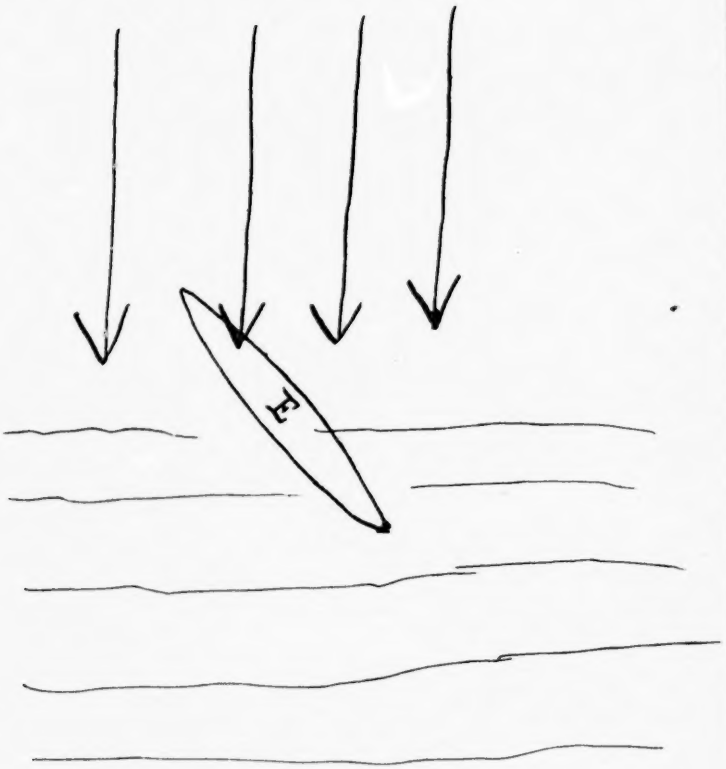
A. Waregames á un largo.
Q. If the wind was two points on the quarter, would you still say "waregames a un largo"?
A. No. "Siendo;" "atravesados" abeam; "á un largo" two points abaft of beam.
Q. Have you never heard the expression "atravesados al viento" for this position indicated in the diagram *was* lying to, "E," or never saw it written in any log?
A. Not this position. It is not used, neither can it be used.
Q. Even in this position "E" these waves are crossing the vessel to some extent; isn't that so?
A. Yes.
Q. If it crosses to some extent, why not say "atravesados"?
A. Because that has its own term, which is "capiendo."

The diagram made by the witness is marked Libellants' Exhibit X.

(Here follow diagrams marked pp. 164*a* & 164*b*.)

Libts. Exhibit X.

No. 249.
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Navigacion La
Flecha.
} p. 1614a



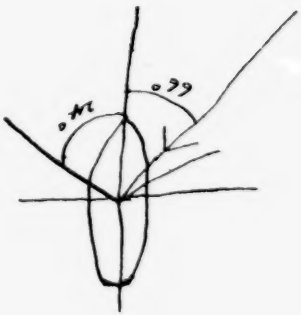
Capeando el huracan

quedando sueltos varios bueyes paramos la maquina quedando atravesados al viento y mares.

Anochecio tiempo huracanado maquina parada atravesados al viento y mares dando el buque fuertes balances que le hace sufrin terriblemente.

Principeamos està Singladura con la maquina parada y el aparejo aferrado con viento y mares huracanados estando el buque atravesado al viento y mares.

No. 249
Brauer Del
v.
Compania
de Navigacion
La Flecha.
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165 District Court of the United States for the Southern District of New York.

WILLIAM W. BRAUER and Others
vs.
COMPANIA DE NAVIGACION LA FLECHA.

Deposition of Jose A. Gartiez, taken on behalf of respondents, at New Orleans, La., February 8, 1893, before E. D. Craig, U. S. commissioner.

Present: B. F. Jonas, for libellants; George Denegre, for respondents.

D. Villa was, by consent of counsel, sworn in as interpreter.

JOSE ANTONIO GARTIEZ was duly sworn as a witness for the respondents, the oath being translated to him by the interpreter from the English into the Spanish language.

Direct examination by Mr. DENEGRE:

Q. Do you remember the dates of the storm in which the cattle concerned in this suit were swept overboard?

A. Yes, sir; a part of the 31st day of October and part of the 1st day of November, 1891.

Q. Do you remember, generally, the direction from which the wind came on the 31st day of October and 1st day of November, 1891?

A. I remember that on the 31st day of October the wind was coming from the north-northeast at nightfall and on the first day of November it came from the north and north-northeast.

Q. Which way was the sea coming from?

A. From the northwest, a very big sea, and from the north-northeast.

Q. Which was the biggest?

A. From the northwest was the biggest sea.

166 Q. Which way did you head the steamer?

A. Varying between east-southeast east to southeast.

Q. Was that, in your opinion, the best way for you to head your vessel?

A. That was the best manner to keep the ship the condition in which she was in.

Q. Was it or not practicable for you to run away from the storm and avoid it?

A. I could not run away from the storm because I was in it already.

Q. Could you not have avoided the storm, knowing that it was coming?

A. I could not tell whether the storm was coming or not, precisely.

Q. Can you give any reason why you could not tell it, as a seaman?

A. Two days previous to the storm my barometer was half and

half, and I thought that no storm was coming, and, if any, that it had already passed.

Q. Is there any regularity about storms, or any method of knowing the approach of storms?

A. At this time of the year you cannot appreciate exactly when a storm is coming.

Cross-examination by Mr. JONAS:

Q. Did the barometer not indicate, on the 30th and 31st of October, that a storm was coming?

A. Since the barometer was not making any movement for two days previous to the storm, I thought that the storm had already passed.

Q. Did you think the storm had already passed on the 30th and 31st of October?

A. I could not tell whether there would be any storm, but I thought it had already passed.

Q. Were you not in the midst of a storm from the 30th of October to the 1st of November, inclusive?

A. The storm lasted from the afternoon of the 31st until midday of the 1st of November.

Q. Had not the barometer fallen greatly before the sterm burst upon you on the 31st of October?

A. The storm and the barometer went so much together that at the moment the storm touched me the barometer went lower.

Q. Did not the barometer fall greatly before this storm
167 burst upon you?

A. I had the barometer low, as I have previously stated, and when the storm caught me the barometer continued going lower until about ten or eleven o'clock the next morning.

Q. Did not the barometer give indications of this approaching storm before it burst upon you, or did not the barometer indicate the storm coming by its decline and fall?

A. I can't tell precisely by the barometer when a storm is approaching, since, in my experience, I have gone with a high barometer in bad weather and with a low barometer in good weather.

Q. Do you consider the barometer an indicator of the condition of the weather approaching, or what weather is coming?

A. I have not the exact confidence in the barometer indicating the approach of a storm.

Q. Do you pay any attention to the barometer as an indicator of an approaching storm?

A. I just look at the barometer every day.

Q. Only once a day?

A. Sometimes I see it twenty times and sometimes I do not see it at all.

Q. State whether in your experience as a captain you considered it a matter of importance to consult the barometer as an indicator of the approach of an approaching storm or storms?

A. When the barometer goes lower, I take it as an indication of

bad weather approaching, and when it is high, as an indication of good weather coming, but yet, in my experience, I have seen it otherwise.

Q. Do you as a navigator and captain, consult the barometer as an indicator of the approaching weather?

A. I consult the barometer for the purposes asked.

Q. During the duration of this storm, what course did you pursue with your ship?

A. The first thing I did was to stop the engines, and I put the head of the ship east-southeast to southeast.

Q. Did that bring the bow of the ship to the wind?

A. No.

Q. Did it bring the ship with her bow to the sea?

A. No.

168 Q. Is not that the best and proper position to place your ship during a storm?

A. In my opinion and experience, taking the condition of my ship at the time, I think that the best way was to do as I did.

Q. Do you state that that was the best position in which to place your ship in order to protect its deck-load of cargo or cattle on board?

A. Yes, sir.

Q. Wasn't your ship in the position in which you placed her receiving the waves, or ship seas on both sides; or, in other words, wasn't she liable to be swept by the waves on both sides?

A. Yes, sir.

Q. Did not that expose your deck-load to great danger, or the cattle on board?

A. The least danger that they could receive was in the position I put my ship.

Q. If you had placed the bow of your ship to the wind, brought her up to the wind, would you not have merely received the waves over the bow?

A. If there had been only one sea, then I would undoubtedly have received the sea over the bow, but then there were two seas, and in those conditions I think the best position was that in which I put the ship; since there were cross-seas, I did not know the best one in which to put it to.

Q. In the position in which you put your ship, were not her decks exposed to be swept by both cross-seas?

A. The sea was coming from both sides, port and starboard, the port from the seas, and on the starboard from the rolling of the ship.

Q. State whether she did not receive the seas from both sides in the position in which you had placed her?

A. I took water from both sides, but then it was from only the port side that the sea was coming.

Q. Would this ship have taken water if you had held her bow to the sea?

A. With such a storm I could not put my bow to the wind,

because my engines were not powerful enough in that storm to make the operation.

Q. What was the power of your engines?

A. I can't positively state that.

169 United States District Court.

WILLIAM W. BRAUER *et al.*
vs.
COMPANIA DE NAVIGACION LA FLECHA.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

Henry Despard, being duly sworn, says: Before the trial of this cause I made diligent efforts to find the cattlemen who were on board the *Hugo* on the voyage in question, but was unable to learn anything about any of them except the two foremen. Messrs. Brauer & Co. also endeavored to find the others, but were not successful. They were not regularly employed by Brauer & Co., but only for the voyage in question. Edwards and Joyce, the two foremen, could not tell us where any of the others could be found.

HENRY DESPARD.

Sworn to before me this 23d day of February, 1893.

JOHN McCLURE,
[SEAL.] *Notary Public, N. Y. Co.*

We consent that the foregoing affidavit be read in evidence.

BUTLER, STILLMAN & HUBBARD.

170 United States District Court, Southern District of New York.

WILLIAM W. BRAUER *et al.*
against
COMPANIA DE NAVIGACION LA FLECHA.

It is hereby stipulated that the English judicial decision as contained in the printed reports of the law or admiralty courts may be referred to by either party as evidence of the English common or maritime law as administered in the English courts.

MacFARLAND & PARKIN,
Libellants' Proctors.
BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent.

(Endorsed:) Stipulation respecting British law.

171 LIBELLANTS' EXHIBIT 1.

Know all men by these presents, that whereas the Reliance Marine Insurance Company, Limited, of Liverpool, issued their policy No. 4253, dated October 16th, 1891, to W. W. Brauer & Company, on

one hundred and sixty-five head of cattle shipped on board the steamship *Hugo* from New York to Liverpool, and,

Whereas, it is claimed that a loss has occurred under said policy, amounting to the sum of $9,525,

Now, therefore, in consideration of the payment of said loss to the holders of the company's certificate as provided in said policy, and of one dollar to us paid, we, William W. Brauer and Frederick C. Brauer, composing the firm of W. W. Brauer & Company, the assured mentioned in said policy, do assign, transfer and set over to said Reliance Marine Insurance Company, Limited, of Liverpool, all rights which we have against the said steamship *Hugo*, or against the owners thereof, for any injury, loss, damage or destruction to or of the property covered by said policy or any part thereof, to the extent of the loss so paid or to be paid by said company.

To have and to hold the same unto the said Reliance Marine Insurance Company, Limited, of Liverpool, its successors and assigns forever, hereby constituting and appointing the said company our true and lawful attorney irrevocable in our name, place and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover and receive all such sum or sums of money which now are, or may hereafter become due, owing and payable for, or on account of all or any of the accounts, dues, debts and demands above assigned, giving and granting unto the said attorney, full power and authority to do and perform all and every act and thing whatever requisite and necessary, as fully, to all intents and purposes, as we
172 might or could do, if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that the said attorney or *its* substitute shall lawfully do, or cause to be done by virtue hereof.

In witness whereof, we have hereunto set our hands and seals the 30th day of November, one thousand eight hundred and ninety-one.

WM. W. BRAUER & CO., [SEAL.]
By WM. W. BRAUER.

Sealed and delivered in presence of—

—— ——.

STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

On this 30th day of November, 1891, before me personally appeared Wm. W. Brauer, a member of the firm of W. W. Brauer & Company, to me known and known to me to be one of the individuals described in, and who executed the foregoing instrument, and acknowledged to me that he executed the same, in the name of the said firm, and on their behalf, as a member thereof.

Given under my hand this 30th day of November, 1891.

J. B. ELAM,
Notary Public.

173 LIBELLANTS' EXHIBIT 2.

White Star Line.

Cattle Contract—Memorandum of Agreement

Concluded at New York the tenth day of October, 1891, between H. Maitland Kersey, agent of the Spanish steamer *Hugo*, and Messrs. William W. Brauer & Co., of Richmond, Va.

The agent agrees to let to the said shipper suitable space, as undernoted, for the transportation of live cattle: this is to say:

On the steamer *Hugo*, intended to sail from New York about Oct. 24th, 1891, for Liverpool, England.

For about one hundred sixty live cattle on the upper deck.

No other cattle to be carried this voyage.

The shipper agrees to ship all the cattle, as above-mentioned, at the rate of fifty shillings, British sterling, for each animal shipped on open decks.

The shipper especially agrees to prepay freight on the above-mentioned shipments on date of sailing, in current funds at the rate for which prime bankers are selling sight bills on London, on the number of cattle shipped at New York, vessel lost or not lost, and irrespective of the number landed at the port of destination, and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage.

Stalls to be put up at ship's expense, and to be constructed to the satisfaction of the inspector or underwriters interested, and to the satisfaction of shipper, who will assume all responsibility for same, and for the various appliances for ventilation after shipment of cattle.

The steamer undertakes to supply sufficient good condensed or fresh water for the use of the animals during the voyage; also, water casks and hose.

Steamer to provide space free of charge, for corn and
174 strictly compressed fodder for animals, but freight, if demanded, shall be payable on any unusual excess of fodder landed at port of destination. If fodder be supplied that is not strictly compressed, a proportionate quantity may be carried on deck.

Steamer to supply suitable gangways and elevators for loading cattle.

Steamer to give free passage, over and back, and to supply bedding to drovers in charge of animals (not exceeding one man to every 30 cattle), and if not returning direct to port of sailing, to provide free intermediate passage back for foreman, and free steerage passage back for other attendants, by first available steamer of this line.

Steamer to give six running days' notice of her intended departure, and twelve hours' notice of the hour the cattle must be deliv-

ered to her, but such notices to be given or received are subject to become inoperative in case of strike or stoppage of labor.

Steamer guarantees to sail as soon after shipment of all the animals as tide and weather permit, or pay expenses of keep of animals at the rate of 50c. per head per day in full.

Steamer has privilege of exceeding her net register tonnage in grain, upon paying to shippers the extra premium charged by the underwriters with whom the animals are insured.

Shippers to deliver the cattle to the vessel between sunrise and sunset, at the dock or in the stream, at their option.

Shippers guarantee to deliver animals by expiry of notice, provided vessel is ready for them, or to pay for detention of steamer at the rate of £50 per day.

In case of non-arrival of vessel in time to sail from New York on or before November 4, 1891, shipper has option of cancellation.

The line form of live stock bill of lading to be used for cattle shipped under this contract, and its conditions to govern any questions not provided herein, subject to U. S. Government inspection.

175 Any dispute arising under this contract to be settled by arbitration in the usual way.

Dated New York, October 10th, 1891.

H. MAITLAND KERSEY.
WM. W BRAUER & CO.

JNO. LEE.

Arrivals at Liverpool.

Date of arrival.		Steamer.	From—	Cattle.				Sheep.			
				Shipped.	Landed.		Lost at sea.	Shipped.	Landed.		Lost at sea.
					Alive.	Dead.			Alive.	Dead.	
1892.											
November	1	Georgian	Boston	500	499	.....	1				
	"	Oregon	Montreal	177	176	.....	1	145	142	1	2
	"	Armenia	New York	120	120						
	"	Greece	Do.	268	268						
	7	Columbian	Boston	343	343						
	"	Roman	Do.	460	459	.....	1				
				268	268						
	"	Runic	New York. Buffaloes	10	10						
	8	Lake Superior	Montreal	245	245						
	"	Toronto	Do.	397	397	.....	.....	63	63		
	"	Hugo	New York. Reported to have been jettisoned alive.	165	38	.....	127				
October	23	Labrador	Montreal	662	650	3	9				
	"	St. Romans	New York	623	607	1	15				
	"	Tauric	Do.	427	426	.....	1				
	"	Lake Ontario	Montreal	403	400	1	2	40	39	.....	1
	24	Munidian	Do.	497	496	.....	1	774	768	.....	6
177	25	Norseman	Boston	461	458	.....	3				
October	26	Bostonian	Boston	404	404						
	30	Nomadic	New York	475	474	1					
	"	Rossmore	Baltimore	696	695	.....	1				
	31	Lake Winnipeg	Montreal	194	194						

	"	Ottoman	New York	561	559	1	1				
	17	Sarnia	Montreal	282	280	.....	2				
	18	Baltimore	Baltimore	776	725	.....	51	Heavy weather.			
	"	Kansas	Boston	666	660	.....	6				
	"	Holland	New York	244	229	3	12				
	"	Lake Nepigon	Montreal	319	319	.....	.....	120	118	.....	2
	20	Venetian	Boston	500	297	15	188	Heavy weather.			
	"	St. Pancras	New York	292	261	1	30	Heavy weather			
	21	Sedgemore	Baltimore	744	743	.....	1				
November	4	Nessmore	Boston. Sailed Oct. 13, '91.	520	520						
	"	Ottoman	Do. Sailed Oct. 20, '91.	103	103						
October	28	Norseman	Do. Sailed Oct. 13, '91.	168	167	.....	1	Vessel had bad weather.			
November	12	Palestine	Do.	65	65						
	13	Bulgarian	Do.	200	200						
	14	Michigan	Do.	227	227						
	15	Barrowmore	Baltimore	374	374						
	15	Mongolian	Montreal	405	403	.....	2	75	74	.....	1
	17	Lake Huron	Do.	131	124	.....	7				
	17	Virginian	Boston	500	495	3	2				
	"	Cuffe	New York	268	268						
	"	Denmark	Do.	242	231	1	10	Bad weather.			
	18	St. Enoch	Do.	270	269	.....	1				
	19	Thorndale	Norfolk	198	197	.....	1				

Attention of shippers is called to the act of Congress of 1851.

"Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment, a note in writing, expressing the nature or character of such merchandise to the master, mate, or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars."

(Cut of ship.)
J. Bruce Ismay, agent, 41 Broadway, New York.

165 head live cattle on the upper deck.

G. H. Fletcher & Co., agents, Mersey chambers, Old Churchyard, Liverpool.

George Roddick (9 Nov., '91), 16 Water St., Liverpool.

Freight prepaid.

Received in apparent good order and condition, by the Spanish steamer "Hugo," from Wm. W. Brauer & Co., to be transported by the good steamship "Hugo," now lying in the port of New York and bound for Liverpool, one hundred and sixty-five live cattle on deck. On deck at owners' risk; steamer not to be held accountable for accident to or mortality of the animals from whatever cause arising, being marked and numbered as per margin (weight, quality, contents and value unknown), and to be delivered in like good order and condition at the port of Liverpool (or so near thereto as she may safely get) unto shippers' order or to his or their assigns, he or they paying freight and primage (if customary) in cash, without discount, on the said goods upon discharge, at the rate of —— shillings —— pence sterling per 40 cubic feet. —— shillings —— pence sterling per ton of 2,240 lbs., gross weight, delivered with 5 per cent. primage, and charges as per margin. General average payable according to York-Antwerp rules.

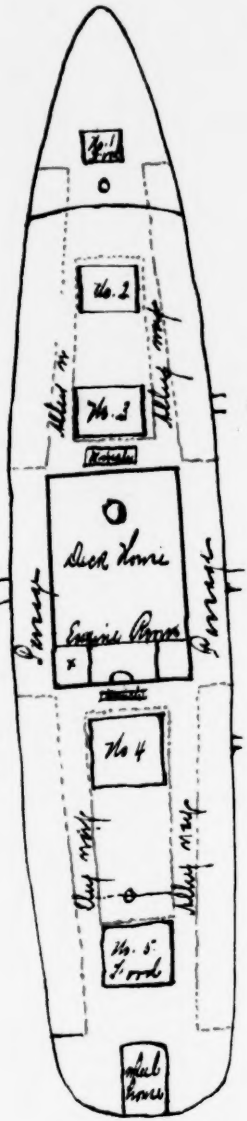
It is mutually agreed that the ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters; by fire from any cause and wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shaft, or any latent defect in hull or machinery, or appurtenances; by collisions, stranding, or other accidents of navigation, of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager); nor by decay, heating, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency, or absence of marks, or numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, em-
179 broideries, perfumeries, works of art, silks, furs, china, porcelain, watches, or clocks, in any respect, or for goods of any description whatever above the value of $20 per cubic foot, and in no case is the carrier to be liable beyond $500 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.

(Printed across the face: Freight prepaid in New York.)

"Hugo"



Gangway opened

Gangway opened

Gangway opened

Gangway opened

x 1st Engineers cabin

The red lines show the position of the cattle pens -

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Beaurivage
v.
Compagnie de Navigation La Fleche
} No 179a

Claimants Exhibit
1 July 29th 1912

2. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, the carrier shall have a lien on the goods for all freights, primages and charges, and also for fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering or addressing of packages or description of their contents.

4. Also, that in case the ship shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

5. Also, that the ship may commence discharge immediately on arrival and discharge continuously, the collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and upon discharge, the goods shall be at the risk of the consignee, and if not taken by him within such time as is provided by the regulations of the port of discharge, they may be stored by the carrier at the expense and risk of their owners.

6. Also, that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, that if, on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the custom-house, less all charges saved.

9. Also, that the master porterage of the delivery of the cargo be done by the consignees of the ship, and the expense thereof be paid by the receivers of cargo.

10. Also, that freight, payable on weight, be paid on gross weight discharged from ocean steamers unless otherwise agreed.

11. Also, that this bill of lading, duly endorsed, be given up to the ship's consignee in exchange for delivery order.

12. Also, that freight prepaid will not be returned, ship lost or not lost.

13. Also, that parcels for different consignees, collected or made up in single packages addressed to one consignee, pay full freight on each parcel.

14. Also, that this contract shall be governed by British law, with reference to which law this contract is made.

And, finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof, the master or agent of the said ship hath affirmed to two bills of lading, all of this tenor and date, one of which being accomplished and given up to the carrier, the others to stand void.

Dated in New York this 24th day of October, 1891.

For the agent, JNO. LEE.

(Endorsed:) Wm. W. Brauer & Co.; George Roddick, by J. H. Pagen.

(Here follows diagram marked p. 179*a*.)

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COMPANIA DE NAVIGACION LA FLECHA.

1900
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180 RESPONDENT'S EXHIBIT C.

Translation of Log.

OCT. 30TH.

On the fifth hour a heavy sea destroyed some of the cattle-houses on the port side and opposite hatches No. 4 and No. 3. We immediately fixed up in the best manner that it was possible the houses and the oxen; the boards that were lying loose on the deck we threw overboard. Nightfall, the weather slightly clear towards the horizon with signs of heavy rain clouds; wind fresh from the northwest, seas very lively from the same direction and from the west, coming on board with less force than during the afternoon, and in this way we passed the night. At daylight, wind very fresh from the north, with seas from the same direction and from the northwest. On the twentieth hour we stopped the engine in order to arrange the houses that had been broken during the night opposite No. 4, and replaced the oxen that were outside of their houses. At nine o'clock they were all back into their places with the exception of one which remained on hatch No. 5, and which notwithstanding all our endeavors to get him to rise, it has been impossible to succeed, he remaining on the same hatch No. 5. Subsequently, and while the engine was still stopped, we gave food and drink to all the oxen. On the twenty-second hour after all was arranged we again started under full steam and continued to sail in the direction of our course, and without further mishaps we arrived at the middle of the day, and there being no observation we situated ourselves by dead reckoning in the latitude and longitude noted.

31st.—Commencing this day with very strong wind from the north-northeast with very lively seas from the same direction and from the northwest, which came on board from all over, flooding the houses and bridges always full of water and governing our course as noted in the table. In the second hour weather
181 very hard from the north-northeast, the heavens and the horizon closed and with rain accompanied by very heavy seas with full crest, also from the northwest, which strike against the sides of the vessel coming on board and making the vessel labor terribly. At this hour some of the houses opposite No. 4 were destroyed; several of the oxen being loose, we stopped the engine and remained crosswise to wind and seas, seeing that the weather was becoming worse at every moment and that the barometer continued to fall rapidly (at this time, 29.55), we determined to open gangway No. 4 in order that the oxen that were loose could go over, which was done with much precaution to avoid personal mishaps. Once that it was opened the oxen that were loose were carried over with the heavy rolling of the vessel; these were about ten, with the one mentioned on the previous day which was almost dead, which we threw overboard with ropes. Towards nightfall weather quite a hurricane, the machinery stopped, and laying crosswise to the wind and waves, the vessel rolling and making all suffer very much. At twelve hours we set the mainsail with the object of

steadying the vessel. The greater portion of the oxen are down and many are carried from port to starboard with the boards from the houses loose on account of the heavy rolling of the vessel and with a thick and heavy sea that comes on board on both sides. In this way and with the weather declared into a hurricane, we passed the balance of the night. At daylight, hurricane. All the deck is in a lamentable state; the cattle from port to starboard and from starboard to port, some with their legs broken, others dead with so much suffering, others with their legs tangled in the rail, and some, during the night by the blows of the seas and the rolling of the ship, had gone out through the gangway to the water. On the nineteenth hour we decided to open gangway No. 3, which was done with much precaution, as it was impossible to go on deck on account of the rollings, and the seas that continually came in, and we immediately commenced the sad operation of throwing over all the
cattle that were loose on the decks and in sorry plight, some
182 with ropes, and others dragging them to the gangway, and from here, the seas that were boarding us would carry them over. We have noticed the absence of some of the hatch wedges, very likely knocked out by the cattle during the night, and have immediately replaced them with new ones. The hurricane continues with as great force and fury, the barometer 29.21. Notwithstanding our precautions to avoid personal mishaps, at 10.30 in the morning more or less, a sea carried out through gangway No. 3 one of the boys named Enchortiata. He was carried over. We noted his absence and immediately, as he had not become separated from the side of the vessel, we threw him a life-preserver, and with the aid of a thin rope we were able to save him. On coming on deck we noted that he was bleeding from one ear, no doubt having received a blow on that part. We put him to bed. On the 23d hour the wind carried away the mainsail, leaving nothing but the boltropes of the same. At noontime the stern was clear, there being no more cattle. There are only some remains of the houses. Towards the bow the gangway No. 3 is clear, as also the hatchway. There remain on board only thirty-nine oxen, and those up by the bow forward of No. 3 which are the ones that suffered less from the effects of the hurricane. At noontime there was no observation, the heavens being completely closed, and we situated ourselves in latitude and longitude noted in its proper place. In this day as in the previous one, it has been impossible to sound the well on account of the storm. Operating the steam pumps every two hours, we noted that they sucked a great deal of water, no doubt by reason of the straining of the vessel.

The losses that we have suffered are the following: 126 head of cattle, the mainsail, a number of rail posts, and the ladder.

November 1st.—We commenced this day with the engines
stopped and the rigging taut, with hurricane, the vessel
183 crosswise to wind and seas. Towards afternoon the wind slackened somewhat in force, but the high and crested seas continued the same, striking the vessel as in the previous day, and with much rolling. On the fourth hour we put up the staysail to

steady the rolling of the ship. Night came on with the wind very hard from the north, accompanied by terrible seas with heavy crests which strike against the hull, making the vessel shiver. At eight o'clock the wind commenced to decrease and the seas gradually to go down. On the eighteenth hour the improvement was quite marked in wind and seas, and we were able to proceed under full steam governing our course as by the table. The barometer continues to rise slowly. At daylight the sky is partially cleared, the horizon very dark, wind heavy from the north, seas very heavy from the same direction, also from the northeast, which makes the vessel labor very hard with much rolling. The seas still coming on deck and bridges and keeping the decks continually full of water. In this manner we entered the day and situated ourselves by observation in latitude 47° 41″ and longitude 29° 26″.

Draft of the vessel 21 feet 8 inches forward, and 23 feet aft.

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RESPONDENT'S EXHIBIT D.

S. S. "Hugo," New York to Liverpool.

Date, Friday, Oct. 30, 1891.	Pressure of steam in lbs. on safety valve.	Vacuum in condenser.	Revolutions per minute.	Coals.		Quality of coals.	Tallow.	Oil.	Density of water.	Wind, ahead, abeam or free, &c.; rough sea, and general remarks.
				Cwt.	*Qrs.*		*Lbs.*	*Gals*		
Middle watch. Midn't.										
XII.										
I.	87	24	50	....	....	American, bad.	....	....	....	Strong gale blowing.
II.	"	"	"	....	....		....	....	....	
III.	"	"	"	....	....		....	....	....	
IV.	"	"	"	....	....		....	....	....	
Morn'g watch. V.	87	24	50	....	....		....	....	....	
VI.	"	"	"	....	....		....	....	....	
VII.	"	"	"	....	....	"	....	....	....	Carrying cattle pens away.
VIII.	"	"	"	....	....		....	....	....	
IX.	87	24	50	....	....		....	....	....	
X.	"	"	"	....	....	"	....	....	....	Carrying cattle pens away.
XI.	"	"	"	....	....		....	....	....	
XII.	"	"	"	....	....		....	5	....	Revolutions, 70,700.
I.	87	24	48	....	....	"	....	....	....	
II.	"	"	"	....	....		....	....	....	
III.	"	"	"	....	....		....	....	....	
IV.	"	"	"	....	....		....	....	....	
V.	87	24	48	....	....		....	....	....	
VI.	"	"	"	....	....	"	....	....	....	
VII.	"	"	"	....	....		....	....	....	
VIII.	"	"	"	....	....		....	....	....	
First watch. IX.	87	24	48	....	....		....	....	....	
X.	"	"	"	....	....	"	....	....	....	Gale increasing.
XI.	"	"	"	....	....		....	....	....	
XII.	"	"	"	....	....		....	195	....	
For 24 hours.	87 Average.		50				Total.		....	Distance run, 280 knots.

Coals commenced this day with..... 384 tons.
Burned today..... 34 "

Remaining on board..... 350 "

(Signed) —— ——, *Master.*
—— ——, *Engineer.*

185 *S. S. "Hugo," New York to Liverpool.*

	Date, Saturday, Oct. 31, 1891.	Pressure of steam in lbs. on safety valve.	Vacuum in condenser.	Revolutions per minute.	Coals. Cw.	Coals. Qrs.	Quality of coals.	Tallow. Lbs.	Oil. Gals	Density of water.	Wind, ahead, abeam or free, &c.; rough sea, and general remarks.
Middle watch.	Midn't.										
	XII.										
	I.	87	24	48	..	....	American, bad.	....	....	....	Hurricane blowing.
	II.	"	"	"	...	....		....	....	....	
	III.	"	"	"	...	....		....	....	....	
	IV.	"	"	"	....	....		....	....	....	
Morn'g watch.	V.	87	24	48	....	....		....	....	....	
	VI.	"	"	"	....	....	"	....	....	....	
	VII.	"	"	"	...	....		....	....	....	
	VIII.	"	"	"	....	....		....	....	....	
	IX.	87	24	48	...	....		....	....	...	Stopped 8.15, fixing cattle pens; went ahead slow at 9.
	X.	"	"	"	....	....	"	....	....	....	
	XI.	"	"	"	...	....		....	....	....	
	XII.	"	"	"	....	....		....	5	....	Revolutions, 66,240
	I.	87	24	40	....	....		....	....	..	
	II.	"	"	"	....	....	"	....	....	....	
	III.	"	"	"	....	....		....	....	....	Stopped engines 2.30 p. m.
	IV.	"	....	....	....	....		....	....	....	
	V.	80	....	....	....	....		....	....	....	
	VI.	"	..	..	....	....		..	....	....	Weather similar.
	VII.	"	....	....	....	....		....	....	....	
	VIII.	"	..	....	....	....		....	....	..	
First watch.	IX.	80	....	....	..	....		....	....	....	
	X.	"	....	....	....	....		....	....	....	Weather similar.
	XI.	"	....	....	....	....		....	....	....	
	XII.	"	....	....	....	....		....	200	....	
	For 24 hours.	87 Average.		48				Total		...	Distance run, 261 knots.

Coals commenced this day with ..... 350 tons.
Burned today ..... 34 "

Remaining on board ..... 316 "

(Signed) —— ——, *Master.*
—— ——, *Engineer.*

	Date, Monday, Nov. 2, 1891.	Pressure of steam in lbs. on safety valve.	Vacuum in condenser.	Revolutions per minute.	Coals.		Quality of coals.	Tallow.	Oil.	Density of water.	Wind, ahead, abeam or free, &c.; rough sea, and general remarks.
					Cwt	*Qrs.*		*Lbs.*	*Gals*		
Middle watch.	Midn't.										
	XII.										
	I.	80	....	....	....	....	American, bad.	....	....	....	Weather moderating.
	II.	"	....	....	....	....		....	....	....	
	III.	"	....	....	....	....		....	....	....	Slow ahead at 3.
	IV.	"	24	40	....	....		....	....	....	
Morn'g watch.	V.	87	24	49	....	....		....	....	....	Full ahead at 5.
	VI.	"	"	"	....	....	"	....	....	....	
	VII.	"	"	"	....	....		....	....	....	
	VIII.	"	"	"	....	....		....	....	....	
	IX.	87	24	49	....	....		....	....	....	
	X.	"	"	"	....	....	"	....	....	....	Full ahead at 5.
	XI.	"	"	"	....	....		....	....	....	
	XII.	"	"	"	....	....		....	5	....	Revolutions, 26,460.
	I.	88	24	49.5	....	....		....	....	....	
	II.	"	"	"	....	....	"	....	....	....	Wind abeam.
	III.	"	"	"	....	....		....	....	....	Moderate sea.
	IV.	"	"	"	....	....		....	....	....	
	V.	88	24	49.5	....	....		....	....	....	
	VI.	"	"	"	....	....	"	....	....	....	Moderate sea.
	VII.	"	"	"	....	....		....	....	....	
	VIII.	"	"	"	....	....		....	....	....	
First watch.	IX.	88	24	49.5	....	....		....	....	....	
	X.	"	"	"	....	....	"	....	....	....	Moderate sea.
	XI.	"	"	"	....	....		....	....	....	
	XII.	"	"	"	....	....		....	207	....	
	For 24 hours.	87	Average.	49				Total		....	Distance run, — knots.

Coals commenced this day with ..... 306 tons.
Burned today ..... 15 "

Remaining on board ..... 291 "

(Signed) —— ——, *Master.*
—— ——, *Engineer.*

	Date, Tuesday, Nov. 3, 1891.	Pressure of steam in lbs. on safety valve.	Vacuum in condenser.	Revolutions per minute.	Coals.		Quality of coals.	Tallow.	Oil.	Density of water.	Wind, ahead, abeam or free, &c.; rough sea, and general remarks.
					Cwt.	*Qrs.*		*Lbs.*	*Gals.*		
Middle watch.	Midn't.										
	XII.										
	I.	88	24	49.5	....	....	American, bad.	....	....	....	
	II.	"	"	"	....	....		....	....	....	Wind abeam.
	III.	"	"	"	....	....		....	....	....	Moderate sea.
	IV.	"	"	"	....	....		....	....	....	
Morn'g watch.	V.	88	24	49.5	....	....	"	....	....	....	Moderate sea.
	VI.	"	"	"	....	....		....	....	....	
	VII.	"	"	"	....	....		....	....	....	
	VIII.	"	"	"	....	....		....	....	....	
	IX.	88	24	49.5	....	....	"	....	....	....	Moderate sea.
	X.	"	"	"	....	....		....	....	....	Revolutions, 70,100.
	XI.	"	"	"	....	....		....	....	....	
	XII.	"	"	"	....	....		....	....	....	
	I.	88	24	49.7	....	....	"	....	....	....	Weather moderate.
	II.	"	"	"	....	....		....	....	....	
	III.	"	"	"	....	....		....	....	....	
	IV.	"	"	"	....	....		....	....	....	
	V.	88	24	49.7	....	....	"	....	....	....	Weather moderate.
	VI.	"	"	"	....	....		....	....	....	
	VII.	"	"	"	....	....		....	....	....	
	VIII.	"	"	"	....	....		....	....	....	
First watch.	IX.	88	24	49.7	....	....	"	....	....	....	Weather moderate.
	X.	"	"	"	....	....		....	....	....	
	XI.	"	"	"	....	....		....	....	....	
	XII.	"	"	"	....	....		....	212	....	
	For 24 hours.	88	Ave'ge	49.5				Total		....	Distance run, 277 knots.

Coals commenced this day with ..... 291 tons.
Burned today ..... 34 "
Remaining on board ..... 257 "

(Signed) —— ——, *Master.*
—— ——, *Engineer.*

188 United States District Court, Southern District of New York.

WILLIAM W. BRAUER *et al.*
vs.
COMPANIA NAVIGACION LA FLECHA.

In admiralty. Loss of cattle.

MacFarland & Parkin for the libellants.

Butler, Stillman & Hubbard and Mr. Mynderse for the respondents.

BROWN, *J.*:

The above libel was filed to recover damages for the loss of 129 cattle out of a shipment of 165, upon a voyage of the steamer *Hugo* from New York to Liverpool in October and November, 1891. The steamer sailed from this port on the 24th of October. During three days from October 30th to November 1st, inclusive, the vessel met heavy weather, during which there was heavy rolling of the vessel. The cattle were in pens on deck; a few forward under and near the turtle-back, which were saved; the rest were in the vicinity of Nos. 3 and 4 hatches forward and aft of the engine-room in pens built in the wings on the port and starboard sides of the ship, all of which were lost. The storm was heaviest on the afternoon and night of Saturday the 31st, the wind and seas coming first, and heaviest, from the northwest, but on Saturday hauling to the northward and to east-northeast, with cross-seas. Some slight damage was done to a few pens on the 30th; more were broken on Saturday the 31st; but these were repaired and the cattle put in place toward nightfall. About 5 o'clock on that day the after gangways were opened on each side, and about 10 or 12 cattle that had become maimed and helpless were sent overboard through those gangways. The chief
189 loss was during that night and the following morning, when, shortly after daylight, the captain gave orders to open the forward gangways also, and the whole deck was cleared of all the cattle, save the 39 under the turtle-back. The following is a translation of the account given in the ship's log, the master and most of the crew being Spanish:

(Sea time) OCTOBER 30, 1891.

"On the fifth hour (5 p. m.) a heavy sea destroyed some of the cattle-houses on the port side and opposite hatches No. 4 and No. 3. We immediately fixed up in the best manner that it was possible the houses and the oxen; the boards that were lying loose on the deck we threw overboard. Nightfall, the weather slightly clear towards the horizon with signs of heavy rain clouds; wind fresh from the northwest, seas very lively from the same direction and from the west, coming on board with less force than during the afternoon, and in this way we passed the night. At daylight, wind very fresh from the north, with seas from the same direction and from the northwest. On the twentieth hour we stopped the engine in order to arrange the houses that had been broken during the night opposite No. 4, and replaced the oxen that were outside of their houses. At

nine o'clock they were all back into their places with the exception of one which remained on hatch No. 5, and which notwithstanding all our endeavors to get him to rise, it has been impossible, he remaining on the same hatch No. 5. Subsequently, and while the engine was still stopped, we gave food and drink to all the oxen. On the twenty-second hour after all was arranged we again started under full steam and continued to sail in the direction of our course, and without further mishaps we arrived at the middle of the day, and there being no observation we situated ourselves by dead reckoning in the latitude and longitude noted.

31st.—Commencing this day with very strong wind from the north-northeast with very lively seas from the same direction and from the northwest, which came on board from all over, flooding the houses and bridges always full of water and governing our course as noted in the table. In the second hour weather
190 very hard from the north-northeast, the heavens and the horizon closed and with rain accompanied by very heavy seas with full crest, also from the northwest, which strike against the sides of the vessel coming on board and making the vessel labor terribly. At this hour some of the houses opposite No. 4 were destroyed; several of the oxen being loose, we stopped the engine and remained crosswise to wind and seas, seeing that the weather was becoming worse at every moment and that the barometer continued to fall rapidly (at this time, 29.55), we determined to open gangway No. 4 in order that the oxen that were loose could go over, which was done with much precaution to avoid personal mishaps. Once that it was opened the oxen that were loose were carried over with the heavy rolling of the vessel; these were about 10, with the one mentioned on the previous day which was almost dead, which we threw overboard with ropes.

Towards nightfall weather quite a hurricane, the machinery stopped, and laying crosswise to the wind and waves, the vessel rolling and making all suffer very much. At twelve hours we set the mainsail with the object of steadying the vessel. The greater portion of the oxen are down and many are carried from port to starboard with the boards from the houses loose on account of the heavy rolling of the vessel and with a thick and heavy sea that comes on board on both sides. In this way and with the weather declared into a hurricane, we passed the balance of the night.

At daylight, hurricane. All the deck is in a lamentable state; the cattle from port to starboard and from starboard to port, some with their legs broken, others dead with so much suffering, others with their legs tangled in the rail, and some, during the night by the blows of the seas and the rolling of the ship, had gone on through the gangway to the water. On the nineteenth hour (7 a. m. Sunday) we decided to open gangway No. 3, which was done with much precaution, as it was impossible to go on deck on account of the rollings, and the seas that continually came in, and we immediately commenced the sad operation of throwing over all the cattle that were loose on the decks and in sorry plight, some with

ropes, and others dragging them to the gangway, and from here, the seas that were boarding us would carry them over. We have noticed the absence of some of the hatch wedges, very likely
191 knocked out by the cattle during the night, and have immediately replaced them with new ones. The hurricane continues with as great force and fury, the barometer 29.21. Notwithstanding our precautions to avoid personal mishaps, at 10.30 in the morning more or less, a sea carried out through gangway No. 3 one of the boys named Enchortiata. He was carried over. We noted his absence and immediately, as he had not become separated from the side of the vessel, we threw him a life-preserver, and with the aid of a thin rope we were able to save him. On coming on deck we noted that he was bleeding from ear, no doubt having received a blow on that part. We put him to bed.

On the twenty-third hour the wind carried away the mainsail, leaving nothing but the bolt-ropes of the same. At noontime the stern was clear, there being no more cattle. There are only some remains of the houses. Toward the bow and gangway of No. 3 is clear, as also the hatchway. There remain on board only 39 oxen, and those up by the bow forward of No. 3, which are of the ones that suffered less from the effects — the hurricane. At noontime there was no observation, the heavens being completely closed, and we situated ourselves in latitude and longitude noted in its proper place. In this day as in the previous one, it had been impossible to sound the well on account of the storm. Operating the steam pumps every two hours, we noted that they sucked a great deal of water, no doubt by reason of the straining of the vessel.

The losses that we have suffered are the following: 126 head of cattle, the mainsail, a number of rail posts, and the ladder.

November 1st.—We commenced this day with the engine stopped and the rigging taut, with hurricane, the vessel crosswise to the wind and seas. Towards afternoon the wind slackened somewhat in force, but the high and crested seas continued the same, striking the vessel as in the previous day, and with much rolling. On the 4th hour we put up the staysail to steady the rolling of the ship. Night came on with the wind very hard from the north, accompanied by terrible seas with heavy crests which strike against the hull, making the vessel shiver.

At eight o'clock the wind commenced to decrease and the seas gradually to go down." * * *

192 The testimony of the master and of the first officer and the boatswain accords in the main with the statements of the log in regard to the handling of the cattle and the force of the storm.

There were six cattlemen provided by the shippers for the care of the cattle. Several were inefficient. The testimony of Joyce, the foreman, and of Edwards, apparently an efficient man, is to the effect that the violence of the storm was very much exaggerated; that they had been many years making voyages in charge of cattle; that they had been through much heavier weather; and that the sacrifice of the cattle on the afternoon of Saturday and the morning

of Sunday was without reason or necessity. In the great contradiction between these witnesses and the ship's witnesses as to the force and effect of the storm, I have come to the conclusion that there is little candor on either side. The fact that aside from some of the pens, and except the cattle which the men forced overboard, nothing of any account belonging to the ship herself was carried away, is conclusive to my mind that the ship was in no peril, and that there was no such actual hurricane or any such extraordinary storm as the language of the log or the testimony of the officers would indicate. It is manifest that Joyce and Edwards, who were persons of much experience in transporting cattle, were greatly incensed at the sacrifice of the cattle and the brutal treatment inflicted on them. They have not apparently any beneficial interest in this litigation; and if the storm was as violent as the claimants would make out, and the peril such as to demand the sacrifice of the cattle, Joyce and Edwards would not have felt the resentment they evidently display. If the peril was real, they had experience enough to know it. At the same time this resentment has probably led them to belittle the force of the storm and to give perhaps an additional color to what was done. Joyce testifies:

"A. They took the cattle in their charge, of course, and they started to cutting the ropes and getting them over the best way they
193 could; we would not assist them in any way whatever; I would not allow any one to put a hand to them, of my men.
* * *

64 Q. How many were put over the first day?

A. That I could not tell; they had them scattered all over the ship—quite a lot.

65 Q. Were there some put overboard from forward and some from aft?

A. Both places—put them over aft first.

66 Q. Will you state how they put them overboard?

A. They shifted the rail as it is called—the gangway; then they tore up the pens facing the gangway so they would slip on the iron deck; then they would take pitchforks and everything else, and sticking them in them drive them up to this place, and when the ship lurched over like, they would shove them and the cattle would slip off; if they didn't slip off, 4 or 5 sailors would put their backs to them and shove them over; once they started going, they had to go.

67 Q. Was this done on one side or both sides?

A. It could only be done on the one side—the starboard side.

68 Q. Why could it not be done on the port side?

A. Because that was the weather side.

69 Q. Which was the weather side?

A. The port side.

70 Q. Did the vessel have a list?

A. She had a list when we put about—on account of the trysails being over.

71 Q. State whether or not anything was done to get the cattle overboard except what you have stated.

A. One bullock—a white bullock—in particular was very stubborn.

72 Q. What was done with him?

A. They put a rope on him and dragged him as far as the gangway, and then they used a maul on him—a big hammer.

73 Q. What did they do with it?

A. They hit him in the head and tried to kill him; they could not kill him, and they took ropes and got him over the best way they could; of course, when they started I didn't watch everything; I had no reason to watch.

74 Q. When they put the rope on him, how did they get him to the gangway?

A. With a switch and derrick; these ropes leads from the derrick to the deck; they attached that around his horns; dragged
194 him up to the gangway and swung the gangway around; when they got to the gangway they took the rope off.

* * * * * * *

113 Q. What was done, if anything, by the crew with the stalls to enable them to get the cattle overboard?

A. They knocked them down.

* * * * * * *

118 Q. Do you know whether or not the crew of the steamship took up the flooring put there for the cattle?

A. Yes, sir; they took up everything.

119 Q. What was the object in taking up the flooring?

A. To get the cattle overboard.

120 Q. How would that help them to get the cattle overboard?

A. Because there was cleats on the floor and they could get a foothold; when they got them up, they just had the smooth deck.

121 Q. Did you, or not, see one of the crew of the steamship go overboard?

A. A boy; yes, sir.

122 Q. Were you on deck at the time?

A. Yes, sir; standing at the engine-room.

123 Q. What was he doing?

A. He was shoving a bullock over; it was his own fault; the bullock started to go and he kept shoving, and he slid over with him.

124 Q. Will you state whether or not any of the bullocks that were put overboard were dead when they were put overboard?

A. No, sir; they were all as healthy as when shipped.

125 Q. How many cattle were discharged at Liverpool?

A. Thirty-eight head.

126 Q. What became of the other one—you said that there were thirty-nine left?

A. Throwed him overboard.

127 Q. For what reason?

A. Because he was dead.

128 Q. Had he been injured?

A. He got down and got cramped up.

129 Q. In what condition were the thirty-eight delivered?

A. Good condition; not a blemish on them.

130 Q. Do you know anything of the entries in the log of the steamship?

A. No, sir; if I asked them that question they would tell me to mind my own business.

131 Q. Who did you ask?

A. I say, if I did; they never show us anything of that kind.

132 Q. How did the weather at that time compare with
195 other storms that you have encountered when in charge of cattle being shipped on steamers?

A. I would not call it a storm; I call it kind of squally weather.

133 Q. Have you ever passed through storms much worse than that?

A. Yes, sir; twenty times worse.

134 Q. How did your cattle come through on such occasions?

A. Sometimes I lost a lot; sometimes they come through all right.

135 Q. Have you or not at other times passed through such weather as that without losing any cattle?

(Objected to.)

A. Ought not to have lost a bullock this time; ought to land all of them at Birkenhead—no need to have lost a bullock." * * *

Edwards, who had been on cattle voyages for many years, testifies in regard to Sunday morning as follows:

Q. Tell me what you first knew or heard of their driving the cattle overboard.

A. Well, I see them all getting together and getting their mauls—that is, heavy hammers on board ship—and forks. They asked me for a fork; I didn't know what they wanted it for.

Q. Did you ask what they wanted it for?

A. To run the cattle over, they said.

Q. This was in the morning?

A. Yes; that was between half past six and seven o'clock that morning.

Q. Well, go on and tell me what was said.

A. They started in the after place and as soon as they started I went in there and told the other men about it, and I stopped work right there; as soon as they finished the forward part I stopped. I did not touch none of the after part at all, because they were busy then tearing up the sheds and stalls and getting the gangway ready. As soon as they got the gangway ready they tried to shove some off, but they had to take the flooring up—the false flooring which the carpenters put in in New York. After they got that up and the sheds out of the way, every time she gave a lurch four or five went over.

Q. They found they could not drive them over when the flooring was *done?*

196 A. No; there were cleats there on the flooring for the cattle's footing—on the false flooring. They attempted it, but

had to take it up, and then on the smooth deck the cattle slipped and slid.

Q. So that they would slip on the smooth deck and they could force them overboard?

A. Yes, sir.

Q. Who was it told you that they were going to drive the cattle overboard?

A. The sailors.

Q. Did you have any conversation with the captain about it?

A. No, sir; didn't have none whatever, only he called me up before he started and said he would have to clear that hatch there.

Q. Which hatch was that?

A. That was right after; it must have been No. 3 or No. 4 hatch.

Q. Was that hatch covered by the stalls?

A. Yes, sir; it was covered with the flooring—the cattle was over it. * * *

Q. Did you say anything to the captain or the first officer about their driving the cattle overboard?

A. No, sir; I did not say anything to them, but he called me up and told me he was going to get that hatch cleared off; that he was afraid the weather might get worse, and there would be danger to the ship, or something like that. * * *

The statement of Edwards is confirmed by the master's own account of his reason for dragging the cattle overboard. The master testifies:

Q. What did you do, during the afternoon of that day, to improve the situation?

A. Before nightfall I saw that I had to go through a tremendous hurricane, according to the indications of the barometer. * * * I convinced myself that I had tremendous weather, and that I was to have a hurricane that night.

Q. And then you opened the gangway?

A. Towards nightfall I opened the gangway of No. 4 hatch.

Q. On the starboard side?

A. On the starboard side, and when it was opened some of the cattle went overboard. On the same night, or rather this same afternoon, I opened the gangways on the port and starboard side opposite the deck-house, because I *supposed* that in the horrible hurricane *that we would have during the night* the waves would break the cattle out of their places on the port and starboard *bows* and carry them down to the alleyways where there was no
197 resource for their safety. And as I thought, opening this during the night, without my seeing them, but as I had expected, the cattle washed down; the waves broke the houses and washed them down. I do not know how many went over by those gangways during the night, neither do I know how many went over by gangway No. 4; what I saw was that in the morning when daylight appeared I saw from here to here (indicating the places where the stalls are on the starboard side)—I saw there from the bridge, looking over myself, that many of the cattle had their legs

sticking out the sides of the vessel through the rail; some one leg, others two legs, and others with all four. This must have happened, without doubt, during the night. And on that night, as I saw the horrible hurricane, between ten and twelve o'clock—I don't remember the exact hour—opposite each one of the four masts of the vessel I placed oil bags in the water in order to calm down the waves.

Q. Over which side of the vessel was this done?

A. On the port side, to windward.

Q. Did you sleep that night?

A. No, sir.

Q. Describe the situation of affairs the next morning.

A. In the following morning, as I have said before, a great many of the cattle had their legs outside of the rail; the houses were broken—a few were not broken on the forward part of the ship; the cattle were all down, with the exception of those towards the bow, and some were dead, others broke-, others with their horns broken off; some were on their backs, making a heap of cattle and boards all mixed in one. When I saw this condition of things the first officer came to the bridge where I had been all night, and I asked him his advice as to what to do in this situation. He says to me, "The weather is too strong, the sea becomes more crested, the heavens still more threatening."

Q. How was the barometer?

A. I then went to see the barometer, and during that time it was falling very rapidly. I expected that the hurricane would come with still much greater force.

198 Q. Had waves been breaking over the vessel during this time?

A. The waves would break on the deck, over the bridge, over the houses that had already been broken, and there was water everywheres, and there we could see a calamity. The opinion of the first officer and my own opinion, after having looked at the weather and the barometer, was to determine to open gangway No. 3.

Q. About what time in the morning of November 1st was this?

A. About 6 or 7 o'clock—just about daylight.

Q. And then you opened gangway No. 3?

A. Gangway No. 3 was opened.

Q. Had you been able to have breakfast that morning?

A. No, sir.

Q. What was done after opening gangway No. 3?

A. (*We breathed happy when we saw it open.*) * * *

Notwithstanding this description of the situation during Saturday, it is clear from the master's statement, and especially that of the first officer, confirming the statements of the cattlemen, that before the night of the 31st there had been but little damage to the cattle. The first officer says, in answer to the question: "What damage, if any, had been done to the cattle? A. At that time, the 31st, in the afternoon they were not in a very bad state; some of them had already lain down."

The master and the first officer intimate that none but dead animals or those with broken limbs were cast overboard. The log imports no such restriction, while testimony of the boatswain and the carpenter show the contrary. It is plain that the account given by the master and first officer cannot be accepted without considerable abatement and modification. They intimate that the cattlemen were not on deck during the storm, but the details testified to by the cattlemen prove the contrary. The boatswain says: "On the 31st many dead we directed to have thrown overboard, *and some of the live ones* followed the dead of their own accord. * * * Owing to the movement of the vessel they could not retain their footing, and when they fell the seas would carry them out of the gangways. * * * They were more or less injured, because with the breakage of the houses they were struck by the pieces of
199 lumber, and *many were going around* fastened together with those boards. On Sunday morning he says that the most of them were dead, and a great many were with broken legs, and some were alive from hatch No. 2 forward; that "they fixed some ropes so as to hoist and pull over those that were dead and with legs broken, so as to pull them opposite the gangway (No. 3). They were washed overboard, and among the dead there were also some that were alive that would *jump overboard*." * * * He does not say that they could not retain their footing and jumped overboard, because the flooring and cleats which supported them had been torn up by the crew; Joyce and Edwards explain this.

The carpenter testifies:

Q. How was it with the cattle and the pens aft on the morning of November 1st?

A. The houses aft were also all broken on the morning of the 1st.

Q. How about the cattle?

A. Some of *them were going around loose*, others were fastened together with pieces of the boards and generally knocked about the deck.

The carpenter also testifies that the stalls which had been broken at No. 4 hatch were repaired about 5 p. m. of Saturday, the 31st, and the cattle put back in their places, and that the *stalls remained in good order* until they were again broken some time after.

Q. When did they break again?

A. Those and a great many others were broken again during the night.

The first officer, in answer to the question whether the cattle — were lost by being thrown overboard could have been saved, even if the sea had moderated, says:

"A. I don't know; they might have lived or they might not have lived. One of them that remained injured and wounded on board died in two or three days, and the same might have happened with the others.

Q. What is your judgment about it?

A. My opinion is that, after having suffered so much, I do not think they could have lived."

200 The evidence shows that within a few hours after the cattle were driven overboard on Sunday morning the wind abated, and afterwards the seas.

The log does not say that the seas carried away the false flooring and the cleats thereon, by which the cattle were supported; I do not credit the officers' testimony in that regard, both because Joyce and Edwards testify that it was purposely torn up, and because the moving about of the unhurt oxen on Sunday morning, even those hampered by being fastened together, shows that the cleats still remained.

During a considerable portion of the storm the steamer was hove to, *i. e.*, as applied to a steamer, taking the heaviest seas upon her quarter—in this case upon her port quarter.

In the translation of the log and of the first officer's testimony, this situation is described as "lying crosswise to the wind and sea." The words used in Spanish are "Atravesados al viento y mares." Considerable controversy has arisen as to the meaning of this phrase. There is high authority that the phrase has been used at times as a nautical phrase, meaning "lying to;" that is, with the wind and sea not abeam, but at a less angle. In ordinary use the word "atravesados" would mean at right angles or abeam. On the whole testimony I am persuaded that in this case the expression was in fact used in that sense, which is the only sense which an experienced naval officer testifies it could have in the connection in which it appears. This conclusion is confirmed by the fact that the boy who was swept off the gangway with the cattle, and who remained for some fifteen minutes in the water was pulled up the same gangway, showing that the vessel did not move much either forward or aft, as she must have done had she not at that time had the wind very nearly abeam. This agrees also with the ship's heading E. S. E., as given by the master, while the wind was from N. to N. N. E. at that time. The seas accompanying that wind would come athwartships or crosswise, as stated in the log, while the seas coming from
201 the former wind—from the northwest—would be six points aft.

Upon the whole testimony in this pitiful case, I am not disposed to pronounce any unfavorable judgment upon the handling of the ship by the master. His record as a master appears to have been good, and on any doubtful question of navigation he is entitled to the benefit of his record. He had some, though not large, experience in the transportation of cattle, and the experts called by each party place so much stress upon the special circumstances of the situation, the quality of the ship and the necessary determination of the master's own judgment at the time, that in the circumstances testified to I do not find any conclusive proof adverse to the master's judgment as to the navigation of the ship.

The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were

not maimed or substantially hurt was made on the morning of Sunday, the 1st of November, not from any pressing necessity, but solely from mere apprehension; and I am further pursuaded that there was no reasonable or apparent necessity for the sacrifice. It was morning. The night was past. No one testifies to any pressing peril to the ship. The log does not hint of it. No reason appears why such cattle as could go about, and were actually going about, should not have been cared for and preserved. There was plainly no effort made to separate the sound from the maimed. Even the master says, in answer to the question, "Were these cattle standing up that went overboard? A. They were down. Some may have been up; I don't know."

His object plainly was to clear the deck of all the cattle from No. 3 aft, with no attempt to discriminate or to save any. His state of mind is shown by his concluding words: "We all breathed happily when we saw it open" (No. 3 hatch).

If the readiness of the master to make this indiscriminate
202 sacrifice was hastened by the provisions of the bill of lading, which provided that the cattle "were to be at owners' risk; steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising, * * * or negligence of the master or other servants of the ship-owner"—this sacrifice, and the consequent pecuniary loss, furnish but another illustration of the impolicy of all such stipulations. They are invalid by the law of this country; and the further stipulation, which would substitute in such matters the British law for our own, is but another form of the previous stipulation against liability for negligence, and equally invalid. The Brantford City, 29 Fed. Rep., 373, 396; The Iowa, 50 do., 561; Liverpool, &c., *v.* Phenix, &c., 129 U. S., 397, 461; 9 Sup. Ct. Rep., 469.

The libellants are entitled to a decree for damages for such of the oxen voluntarily sacrificed as were either in sound condition or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous; this must be determined, if not agreed upon, on a reference, with costs.

July 8, 1893.

203 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 25th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable Addison Brown, district judge.

WILLIAM W. BRAUER *et al.*
vs.
COMPAGNIA DE NAVIGACION LA FLECHA.

This case having been heard on the pleadings and proofs and having been argued and submitted by the advocates for the respect-

ive parties, and due deliberation being had, it is now ordered, adjudged and decreed by the court, that the libellants recover damages for such of the oxen as were of any market value and not fatally wounded or maimed at the time when the houses and cleats provided for them were designedly torn up, and which oxen were cast overboard or negligently suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous.

It is further ordered, that it be referred to Enos N. Taft, Esq., one of the commissioners of the circuit court of the United States, to ascertain and compute the amount of such damages, and that he report to the court with all convenient speed.

ADDISON BROWN.

(Endorsed:) Interlocutory decree. Filed Oct. 25, 1893.

204 United States District Court, Southern District of New York.

WILLIAM W. BRAUER and Others *vs.* LA COMPANIA DE NAVIGACION LA FLECHA. } Reference to Ascertain Damages.

Before E. N. Taft, Esq., commissioner.

NEW YORK, *November* 17, 1893.

Appearances: Messrs. MacFarland & Parkin, for the libellants; Messrs. Butler, Stillman & Hubbard (Mr. Mynderse and Mr. Cromwell), for the claimants.

JAMES EDWARDS, being duly sworn and examined as a witness for the libellants, testifies:

Q. What is your business?

A. Cattleman.

Q. How long have you been in that business?

A. Since 1881.

Q. How many voyages have you made in charge of cattle as cattleman?

A. I couldn't say exactly. I have made over 80, I believe.

Q. Were you on the voyage of the *Hugo* in October, 1891?

A. Yes, sir.

Q. What day did you leave New York?

A. 24th of October.

Q. Did you meet with any rough weather during that voyage?

A. Yes, sir, I got some little blow. I can't say for certain whether it was the 30th or 31st. It was Friday.

Q. Will you look at the paper I now show you, which is a copy of Claimants' Exhibit 1, and see whether it is a diagram of the deck of the *Hugo?*

A. Yes, sir, it is.

Q. Do the red lines there mark where the cattle pens were?

A. Yes, sir, in the wings.

205 Q. In the wings of the vessel?
A. Yes, sir.
Q. On what deck were those pens?
A. On the top deck—not exactly on the top deck, because there was kind of a slope to that; but this is on the main deck.
Q. There was no deck above the cattle at all?
A. No.
Q. Do the numbers which were on that show where the hatches were?
A. Yes, sir; No. 2, 3 and 4.
Q. How many cattle were there on board when you left New York? Do you know?
A. I believe it was 126.
Q. When you left New York?
A. Yes, sir. I am not certain how many cattle were on the ship, but that *it* what I believe it was—126.
Q. I think the number was 165, was it not, when you first started from New York?
A. I don't remember how many cattle we had.
Q. When did you say the rough weather began?
A. It started to blow Thursday night, very little, though. Friday it freshened up a little.
Q. Was any damage done to any of the cattle pens on Friday? Do you remember?
A. Yes, sir.
Q. Whereabouts? What pens?
A. That was opposite No. 4, on the starboard side.
Q. Which side was it, on the windward side or leeward side?
A. On the weather side of the ship.
Q. Which was the weather side?
A. The starboard side, I believe, was the weather side.
Q. Which side do you mean, on the right-hand side as you look toward the bow, or the left-hand side?
A. It was on the right-hand side looking towards the stern, and the left-hand side looking forward.
Q. That would be the port side, would it not?
A. I think it would be the starboard.
Q. It was on the left-hand side looking toward the bow?
A. Yes, sir.
Q. How many pens were broken; do you remember?
A. I think it was three.
Q. What damage was done to them?
A. Foot-boards and breast-boards of the cattle was broken off.
206 Q. Were those the boards that were in front of the cattle?
A. Yes.
Q. Which way are the cattle's heads turned on the ship?
A. Turned to the midship pen; both sides is turned this way.
Q. Turned inboard?
A. Yes.
Q. What was done to those pens and to the cattle in them?

A. The sailors cut them loose and let them out in the alleyway.
Q. What do you mean by the foot-board?
A. The foot-board is the board right in front of the cattle's feet; it stands like this to keep the flooring of the cattle in, and the stanchions is laid outside of it.
Q. Was the false flooring disturbed at all?
A. Yes, sir.
Q. You say the cattle were taken out and put in the alleyway?
A. Yes, sir.
Q. How long did they remain there; do you remember?
A. Till about 2 o'clock that morning.
Q. That would be 2 o'clock Saturday morning?
A. 2 o'clock Saturday morning.
Q. When did you come on deck?
A. 12 o'clock.
Q. 12 o'clock Friday night?
A. Yes, sir.
Q. What was done with the cattle at 2 o'clock in the morning?
A. I got some ropes and put ropes on them, fresh ropes, and put them back in the pens.
Q. Was the flooring replaced?
A. Yes, sir; the flooring was replaced; it wasn't nailed to the deck at all.
Q. Had the pens been fixed at that time?
A. There was only a temporary board put up in front of them.
Q. What was done with the boards which were there at first?
A. Thrown overboard.
Q. What sort of boards were put in their place?
A. I believe it was an inch board for the breast-board.
Q. Were they not so strong as the others?
A. No, sir.
Q. After the cattle were replaced, what was done to the cattle then?
A. I went forward and looked after them forward then; I took three cattle out of the pen in the wing forward on the same
207 side and shifted them into another pen, where a couple of boards were broken behind them, but the breast-boards wasn't.
Q. There had been a couple of boards broken behind the cattle forward?
A. Yes, sir.
Q. And those cattle you shifted?
A. Yes, sir.
Q. Were those under the turtle-back of the vessel?
A. No, sir; in the wing of the ship, very near the bridge.
Q. Did you remain on deck during Saturday?
A. Until 6 o'clock.
Q. Before you went below and turned in?
A. Yes, sir.
Q. Six o'clock in the morning or afternoon?
A. In the evening.
Q. Then you turned in?

A. Yes, sir, till 12.
Q. 12 o'clock at night?
A. Yes, sir.
Q. Did you go among the cattle at all before you turned in on Saturday?
A. Yes, sir.
Q. In what condition were they?
A. They were all right then, but one; that was one that was jambed in between the ventilator and winch aft.
Q. One had got jambed in between the ventilator and winch?
A. Yes, sir: that was one of the cattle that had been turned loose where it was broken aft; they couldn't get out opposite No. 4 hatch.
Q. That was left there?
A. Yes, sir.
Q. When you turned in the cattle were all in good condition?
A. All in good condition but that one.
Q. When you came on deck at 12 o'clock did you look at the cattle at all?
A. Yes, sir; I went around the cattle.
Q. What condition were they in then?
A. They looked very well then.
Q. They were all right?
A. They were all right but that one; he was in the alleyway still.
Q. Did you feed the cattle that morning?
A. Forward.
Q. You did forward?
A. Yes, sir.
Q. What time did you do that?
A. I started between 5 and 6 o'clock.
208 Q. Were those under the turtle-back, those cattle, forward?
A. Yes, sir, some of them.
Q. Some of them were and some of them were outside?
A. Some of them were and some of them were outside.
Q. But forward of the bridge?
A. Just forward of the bridge.
Q. While you were feeding those cattle did anything happen to the cattle aft at all; what took place Sunday morning?
A. Yes, sir, the sailors came forward and the officer and boatswain.
Q. What did they say?
A. They asked me for pitchforks; I told them where it was and asked them what they were going to do; one of them spoke in broken English and said he would push the beasts overboard.
Q. Push the cattle overboard?
A. Throw the beasts overboard.
Q. What did you see them do after that?
A. After they left me when I was feeding them forward I see them tearing the pens opposite to No. 4 hatch.
Q. Were the cattle in those pens which they tore?
A. Yes, sir.
Q. What did they do with those cattle before they tore those pens up?

A. They shoved them out in the alleyway right opposite to where the stoke-hole is; run them out there and tore them pens down and opened that gangway.

Q. Did they do anything to the flooring of those pens?

A. Yes, sir, they threw that overboard.

Q. It was necessary to tear down the pens in order to open the gangway?

A. They had to do it, the gangway was behind the cattle.

Q. Did you see them open the gangway?

A. Yes, sir.

Q. After they had the gangway opened what did they do?

A. They ran these cattle over that they had in the alleyway.

Q. How did they run them over?

A. Some men stood beside the gangway on the other side
209 and these other shoved them down towards the gangway, and when the ship pitched, out would go three or four or five.

Q. Were the cattle down then or were they standing on their feet?

A. Standing on their feet in the alleyway.

Q. They were driven towards the gangway?

A. Yes, sir.

Q. Were they all standing on their feet?

A. No; these cattle that they drove out of the pen was; they drove them toward the gangway, and when she made a pitch they went out.

Mr. MacFarland:

Q. Then they would slide?

A. Slide out; they had no foothold. The deck was slippery from the water coming over.

Mr. Parkin:

Q. After they had done that to the cattle that were in the pens that were opposite the gangway what did they do then?

A. They ran the wing out.

Q. Did they do anything to the cattle in the other pens?

A. Yes, sir; they cut them loose.

Q. What did they do with those cattle?

A. They run them right to the gangway and there was a couple standing in the gangway which kept them from going in the alleyway, and when the boat would pitch, out they would go.

Q. Did they do that to all the cattle aft?

A. Yes, sir; every one of them.

Q. In what condition were those cattle when they did that?

A. They was all right; there was nothing wrong with any of them so far as I seen.

Q. Were they all on their feet?

A. Yes, sir.

Q. Did they run down to the gangway?

A. They had to run; they had forks to chase them down.

Q. After they had driven the cattle aft overboard what did they do then?

A. They started forward before they got through aft on the same side where I was working. When I see them running them
210 over I went aft and stood between the officers' room and the chief engineer's, right as you go into the engine-room, watching them aft.

Q. Was there any one there with you?

A. Mr. Joyce was there.

Q. Any of the officers or engineers there?

A. The chief officer was there.

Q. Was the chief engineer there?

A. He was there aft awhile.

Q. Was he there that part of the time when they were driving the cattle overboard?

A. Yes, sir; he was standing there.

Q. Did you have any conversation with him?

Objected to. Sustained.

Q. After they had put overboard the cattle aft what did they then do?

A. They finished last forward; they were the last forward that they took off the ship.

Q. Did they open any of the gangways forward?

A. Yes, sir.

Q. Which ones?

A. No. 1, I think it was.

Q. How far forward is that gangway?

A. That is just above the bridge.

Q. When did they open that gangway?

A. They opened that in the morning.

Q. How soon after they opened the gangway opposite No. 4?

A. They had nearly all of one side there aft before they started up forward.

Q. Nearly all the cattle on one side put overboard before they started to open the gangway forward?

A. Yes, sir.

Q. After they opened the one forward what did they do with the cattle forward?

A. They started there and ran them overboard; that is where the boy went overboard—out of the forward gangway.

Q. One of the boys was washed overboard?

A. Yes, sir; he had hold of the oxen's tail, and they kept pushing them and he and the oxen slid over.

Q. He was picked up afterward?

A. Yes, sir; the boatswain threw him a rope.

211 Q. How long was he in the water?

A. I couldn't say for certain how long he was in the water.

Q. You were on deck all this time?

A. Yes, sir.

Q. About how long, do you think?

A. He couldn't have been in it much more than 5 minutes; they threw him a rope and he caught the rope.

Q. In what condition were these cattle that were thrown overboard?
A. First-class condition.
Q. All alive?
A. Yes, all alive.
Q. Did any of them have their legs broken at all?
A. No, sir.
Q. You have been, you say, on a good many voyages with cattle?
A. Yes, sir; worse than what I had on that trip.
Q. Worse weather than you had on that trip?
A. Yes, sir.
Q. Will cattle stand a good deal of rough weather?
A. Yes, sir.

Mr. MacFarland:

Q. Do you lose many as a rule?
A. No, sir; only when they get washed overboard altogether.

Mr. Parkin:

Q. Do cattle get knocked down by the sea and waves ever on board ship?
A. Yes, sir.
Q. Do they ever get their legs broken?
A. I don't remember of but two since I have been in the business getting their legs broken.
Q. Do they ever get their horns broken?
A. Yes, sir; very often.
Q. Did you say you have made over 80 voyages?
A. Yes, sir.
Q. When cattle get their — broken or their horns broken on board ship what do you do to them?
A. When they get their horns broken generally get some tar from the officer or boatswain and pack it up in a bag.
Q. You don't throw them overboard when their horns are broken?
A. No, sir.
Q. When their legs are broken what do you do?
212 A. Bandage it up the best way we can; turn them over from one side to the other to keep them alive as long as we can.
Q. If they are alive do you throw them overboard?
A. No, sir.

Mr. MacFarlane:

Q. Did you make any objection to these cattle being thrown overboard?
A. No, sir.
Q. Did you say anything about their being driven overboard, these cattle?
A. No, sir; I didn't say anything about it; the captain called me up on the bridge deck and he told me he would have to clear this No. 4 hatch, so I didn't understand whether he was going to run

them off No. 4 hatch into the other pens—crowd them up or something—I didn't know his meaning in the first place.

Q. You did not know they were going to do it until they went to work at it?

A. No, sir; I did not until that morning.

Q. Did he say anything about No. 4 hatch being weak?

A. Yes, sir; he said he was afraid of that hatch giving way, and if it did it would swamp the ship.

Mr. PARKIN:

Q. You never throw cattle overboard, then, as I understand it, unless they are actually dead?

A. No, sir.

Q. You take every means you can to bring them in, no matter how wounded they are?

A. Yes, sir.

Q. Who was with you on this voyage?

A. Mr. John Joyce.

Q. Do you know where he is?

A. He is dead, I believe.

Q. He died some little time ago?

A. I don't know how long ago.

Mr. MACFARLAND:

Q. He died in the hospital, didn't he, in Baltimore?

A. Yes, sir.

213 Q. I think you said there was no damage done to the ship Friday?

A. No, sir; not to my knowledge.

Q. You would have known it if there had been, wouldn't you?

A. I would have found out if there had been any damage done.

Q. How did that boy get overboard?

A. Shoving a steer overboard.

Q. Went over with it?

A. Went over with it.

Q. Was the sea very heavy at that time?

A. There was just a heavy swell, that is all; there wasn't much wind going.

Q. Did they have any trouble getting him back?

A. No, sir.

Q. Simply threw him a rope?

A. Yes, sir; it was on the lee side of the ship.

Q. Was the weather improving when the cattle were being thrown over?

A. Yes, sir.

Q. It wasn't as bad as it had been?

A. No, sir.

Q. What is the habit of cattle, lying down, &c., in heavy weather on shipboard; do they lie down?

A. Yes, sir; they lie down; the weather doesn't keep them from

lying down unless they get thrown around, crippled, or something like that.

Q. I suppose they are better able to protect themselves that way?

A. Yes, sir.

Q. Not so likely to get hurt?

A. Yes, sir; they were lying down before they started to run them over, a good many of them.

Q. You say you have been in much heavier weather with loads of cattle without damage to them?

A. Yes, sir.

Q. Many times?

A. I couldn't say exactly how many times, but I have been over a dozen times in worse weather than that.

Q. Did you have worse weather in coming out this time from the other side?

A. Yes, sir; a good deal worse.

Q. You came out with horses?

A. Yes, sir; two horses from London.

Q. I think you say it is not common for cattle to get wounded, even in bad weather?

214 A. No, sir; it depends on the footing of the ship, what they have in under them to hold them.

Q. The flooring?

A. If the flooring stands then they stand very well.

Q. But if the flooring is torn up then they must slip on the deck?

A. Yes, sir.

Q. The flooring has cleats on it?

A. Yes, sir; brace pieces.

Q. You had some cattle under the turtle-back forward?

A. Yes, sir.

Q. About thirty-eight?

A. Thirty-eight we landed; I don't believe it holds thirty-eight in under there.

Q. Those you carried safely to destination, didn't you?

A. Yes, sir; but there was a few outside of that also got carried there.

Q. Those cattle didn't get injured, did they, by knocking about?

A. No, sir; nothing wrong with them at all.

Q. They were left where they were?

A. Yes, sir.

Q. And you carried them in in good condition?

A. Yes, sir.

Q. Sound?

A. Yes, sir.

Q. Showing no signs of bad weather?

Objected to.

A. No, sir; Mr. —— told me they were as good cattle as was in the market.

Q. They showed no signs of bad weather at all?

A. No signs at all.

Q. They were just as much exposed to being shaken up and shaken around as these others, weren't they?
A. Yes, sir; good much.

Mr. PARKIN:

Q. After the cattle were thrown overboard what did they do with the pens?
A. They started clearing the decks with them.
Q. Threw them all overboard, too, did they?
A. Yes, sir.
215 Q. They had torn up the false flooring while they were shoving the cattle overboard?
A. Only in front of the gangway; they tore that up too afterwards, after they got the cattle out.

Cross-examined by Mr. MYNDERSE:

Q. You are the same Edwards that was examined before in this case, are you?
A. Yes, sir.
Q. James Edwards?
A. Yes, sir.
Q. You gave your testimony in April, 1892?
A. Yes, sir; I believe I did.
Q. When did you reach port this time?
A. Last Monday.
Q. When do you go out?
A. I believe I go out Saturday on the *Mohawk;* I came in on Monday on the *Mohawk* of the Atlantic Transport line.
Q. Had you ever been on the *Hugo* before this trip?
A. No, sir.
Q. Or since?
A. No, sir.
Q. Did you have more than one talk with the master about these cattle?
A. No, sir.
Q. Do you know when that talk was?
A. No, I couldn't exactly say when it was. It was on the bridge deck when he called me; I was on the main deck when he called me up.
Q. I believe you admit that the wind blew a little on that voyage?
A. Yes, sir.
Q. Do you remember when it commenced to blow?
A. To my knowledge it commenced Friday.
Q. When did it stop, to your knowledge?
A. It stopped Sunday, it moderated down on Sunday.
Q. How was it on Saturday?
A. It was blowing a little Saturday, but none too much, not for to get around.
Q. I suppose it was about as bad on Saturday as it was any time?
A. Yes, sir; Saturday morning it was.

Q. Not uncomfortably rough, though?

A. I couldn't say for certain, it was anything either way, it was only on one side of the ship, the biggest part of it; that was the weather side.

216 Q. Not uncomfortably rough?

A. No, sir; not uncomfortable.

Q. Do you know whether maimed cattle are permitted to be landed in Liverpool; cattle with their legs broken?

A. No, they ain't allowed to be landed, they kill them aboard ship.

Q. Nor any sick cattle are not allowed to be landed?

A. No, sir, kill them all aboard the ship.

Q. They are only valuable for their hides, hoofs and horns?

A. I can't say; I don't know that much.

Q. But you know that if any cattte have been maimed or injured so as to become feverish they are not allowed to be landed?

A. No, they are killed aboard the ship.

Q. You don't know what uses they are put to when they are killed?

A. No, sir; I do not.

Mr. MacFarland:

Q. Some of the ship's witnesses say that the cattle were thrown from one side of the ship to the other?

A. No, sir; not when I have been around them.

Q. They couldn't be, could they?

A. They didn't show no appearance of it; I was on the deck.

Q. Wouldn't there be something in the way of their being thrown from one side of the ship to the other?

A. I would have to do the work to put them in their place; there was nobody else would do it outside of me except me and Mr. Joyce; they wasn't outside the pens when I was on the deck.

Q. Cattle on the starboard side of the deck couldn't roll way over to the port side?

A. Not very well aft, because the midship pen there would stop them, and then there is another hatch behind that where the mate was and behind No. 5 hatch was an amidship pen on the deck, so they couldn't possibly roll from one side of the ship to the other; the pen wasn't but about that wide, for them to get through; just room enough for them to get through it.

217 Daniel E. Curran, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Parkin:

Q. What is your business?

A. I have been connected, with the exception of about four months, with the exporting of cattle for the last sixteen years, in different capacities.

Q. With what firm were you connected in October, 1891?

A. William W. Brauer & Company.

Q. What were your duties?

A. Buying the feed for the cattle and hiring the men; see that there were good men put on the ship to attend the cattle; pass judgment on what the cattle were worth, in cases where Mr. Brauer himself was not able to see them himself at the port of shipment; and when there was any common cattle shipped for export, pick those out and buy others and replace them with a better class of cattle.

Q. You bought cattle for shipment for them a great many times?

A. Yes, sir; and sold cattle for them.

Q. Where were you located?

A. My office at that time was in Baltimore.

Q. You buy cattle for them in the New York market?

A. I had employed commission men to buy them, such cattle as I wanted, at times, unless it was a few, four or five or ten perhaps, I would buy them myself.

Q. Did you examine the cattle yourself for them?

A. Yes.

Q. Where is the market for cattle which are exported from New York?

A. The principal market of New York is Jersey City, the Central stock yards of Jersey City.

Q. Were you familiar with the price of cattle in that market in October, 1891?

A. Yes, sir.

Q. Were you also familiar from your experience with the quality of cattle and able to pass upon them?

A. I think so, yes.

218 Q. Did you examine the cattle which were shipped by W. W. Brauer & Co. on board the *Hugo* in October, 1891?

A. I did.

Q. What was their character as to quality?

A. With the exception of fourteen that I picked out that I didn't consider good enough for export they were good cattle, extra good.

Q. Were those fourteen exported?

A. No, they were not; I had them sold on the market.

Q. The others you say were extra good cattle?

A. Yes, they were good export cattle.

Q. What in your opinion was the value per head of the cattle shipped on the *Hugo* on that voyage in Jersey City on the day of shipment?

Objected to as incompetent. Allowed.

Q. How often have you bought and sold cattle?

A. For nine or ten years I have not been buying and selling cattle, you understand, that is, in the country; I have been connected at the seaboard.

Q. Were these cattle, all of them, bought in Jersey City?

A. No, I bought ten cattle in Jersey City.

Q. You bought ten of these cattle yourself in Jersey City?

A. Yes, sir.

Q. Where did the others come from?

A. West Virginia.

Q. What did you pay per head for those ten cattle which you bought?

A. The ten cattle weighed 1,450 lbs. and cost $79.75 apiece.

Q. Were the other cattle of equally good quality and value in your opinion?

A. To the best of my belief now the cattle which I bought were not of as fine quality.

By the COMMISSIONER:

Q. You mean these ten were not as fine?

A. The ten were not as fine quality, but a little heavier.

By Mr. PARKIN:

Q. You think the others were rather better than those which you bought?

A. In quality; not in size.

219 Q. So that the others were worth fully $79.75 a head, were they, in your opinion?

A. I wouldn't want to put it to 75 cents; my opinion is the cattle were worth from $77.50 to $80—$78 to $80.

By the COMMISSIONER:

Q. Which are you speaking of now?

A. All excepting the ten.

By Mr. PARKIN:

Q. Do you know whether the freight on the shipment of cattle was prepaid?

A. Yes, sir; it was.

Q. What was the amount of the freight?

A. I have it here. Williams & Terhune paid the freight on those cattle.

By the COMMISSIONER:

Q. The ten you bought you regarded as worth what you paid for them?

A. Yes, sir.

By Mr. PARKIN:

Q. Look at the check which I show you and state if that is the check by which the freight was paid, if you know.

A. This is the check.

Q. What is the amount?

A. $1,996.50.

Q. That was freight on the entire lot?

A. Yes.

Q. Did you buy any feed for the cattle for use on board the vessel?

A. Yes.

Q. How much did you pay for the feed?

A. $582.34.

Q. Were the cattle insured also?
A. Yes, sir.
Q. How much was paid for insurance?

Objected to as immaterial and irrelevant. Allowed.

A. The total loss in general average was $12.38.
Q. Was there another policy also?
A. Yes, sir; one for $75 against all risks.
Q. $75 per head?
A. $75 per head against all risks.
Q. What was the amount of premium for that?
A. $247.50.

220 Mr. Parkin offers in evidence the certificate of inspection showing the cattle were in good condition when shipped.

Objected to. Objection sustained.

Q. Do you know how much of the feed was landed?
A. There was 93 bales of hay landed; 113 bags of corn landed; that is all.
Q. Have you the bill showing what was purchased?
A. Yes; 356 bales of hay; 229 bags of corn.
Q. Can you tell me how much hay and corn would be used for each head of cattle on the voyage?
A. On different classes of steamers they used different amounts; on the White Star steamers and fast steamers like that, I don't suppose they would put on over 200 lbs. of hay for a bullock and 90 lbs. of corn, but on a little slower one they put on more; supposed to be 15 lbs. of hay per bullock for the number of days fed; 10 lbs. of corn per day.

By Mr. Mynderse:

Q. How many pounds of hay are there in a bale?
A. There are no two bales alike; all the way from 165 to 275.

By Mr. Parkin:

Q. Is that the bill for the feed which was purchased? If so, state how many pounds of hay and how many pounds of corn were purchased.
A. 41,940 lbs. of hay; 14,875 lbs. of corn.
Q. How much did the hay cost?
A. 82½ cents a hundred.
Q. What is the total cost of the hay?
A. $46.01.
Q. What was the price per pound of the corn and the total price?
A. $1.22½ per hundred; total, $182.22.

By Mr. Mynderse:

Q. About how much does a bag of corn weigh?
A. From 60 to 75 lbs.

The testimony taken on and before the trial is considered as before the commissioner.

Libellants rest.

221 JANUARY 10, 1894.

Met pursuant to adjournment; all the parties being present as heretofore stated.

Mr. Mynderse calls no witness, but offers in evidence the depositions of the master, officers, and crew of the steamship *Hugo* taken by the respondent and used upon the trial; also the bill of lading, shipping contract, and stipulation respecting the admission of foreign law.

Libellants' counsel produce the following papers to be left with the commissioner:

Pleadings.
Testimony of Joyce and Edwards, taken on the trial.
Affidavit of Despard.
Testimony of captain and crew.
Testimony of Edwards and Curran, taken before commissioner.
Extract from log.
Statement of libellants' claim.

Testimony closed.
Counsel thereupon sum up the case.

District Court of the United States, Southern District of New York.

WILLIAM W. BRAUER and Others
against
COMPANIA DE NAVIGACION LA FLECHA.

To the Hon. Addison Brown, judge of the U. S. district court for the southern district of New York:

222 I, Enos N. Taft, United States commissioner, to whom it was referred by the interlocutory decree in this suit to ascertain and report the libellants' damages "for such of the oxen as were of any market value, and not fatally wounded or maimed at the time when the houses and cleats provided for them were designedly torn up, and which were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st and on the evening and night previous"—

Do hereby report that I have been attended by Messrs. MacFarland and Parkin, proctors for the libellants, and by Mr. Mynderse, of Butler, Stillman & Hubbard, proctors for the respondent, and that I have taken the evidence offered before me, all of which is herewith returned to the court, and upon the said evidence and the evidence taken on or before the trial of the cause, I find and report as follows:

First. The respondent's steamship *Hugo* started from New York October 24th, 1891, for Liverpool, having on board, with a general cargo, 165 head of oxen, belonging to and shipped by the libellants, to be carried on the vessel's deck and delivered at Liverpool. The cattle were tied by ropes in houses, stalls or pens, each holding generally four, though some from three to six cattle, and constructed

by the use of stanchions, supported by the deck and those on the sides by the rail also, and by boards nailed to the stanchions for enclosure and partition, and a covering of boards was put overhead. The cattle were tied to the boards in front of them, apparently those called breast-boards by the witnesses. The dock was of iron, but these houses, stalls or pens were floored over by boards laid upon the deck, but not nailed or fastened to it, but apparently left movable, and upon this flooring cleats were nailed to afford a protection to the cattle from slipping or sliding from the motion of the vessel. These houses, stalls or pens were forward and aft of the deck-house and engine-room situated amidships. Those forward extended along the two sides of the vessel past Nos. 3 and 2 hatches
223 and under the turtle-back, while others forward were built in the center of the ship extended over the hatches Nos. 3 and 2, and those aft extended along the two sides of the vessel past the hatches Nos. 4 and 5, with others aft, built in the middle of the ship over No. 4 hatch and extended back to No. 5 hatch. The location of all these houses, stalls or pens and the passage or alley ways is shown on the diagram, Claimants' Exhibit 1, July 29th, 1892.

The heads of the cattle on the side houses, stalls or pens were faced to the alleyways and towards the center line of the ship running fore and aft. Those in the pens over the hatches were faced to the alleyway, and so towards the pens on the sides of the vessel.

There is no evidence of any flooring or cleats being put down on the passage or alley ways or elsewhere on the deck than in the pens, and I assume that all the other parts of the open deck had simply the plain iron flooring, and that whenever the cattle got outside the pens they ceased to have the protection of the board flooring and cleats to protect them from sliding or slipping, and that their hoofs had no other support than the plain iron surface of the deck.

Second. The evidence shows that the vessel encountered a period of great severity of wind and sea. That something of this was felt on the afternoon of October 30th, when a sea broke over the ship of sufficient force to break down some pens on the port side of the ship opposite No. 3 hatch, which is forward of the dock-house and engine room and No. 4 hatch, which is aft of the deck-house and engine-room. The evidence appears to me to show that the damage to all these pens was probably done by the same wave or blow from the sea. The cattle came out of these broken pens. The master stopped the engine, repaired the houses and placed the oxen back in them, and then proceeded; but towards evening, after having got under headway, these pens were again broken by the sea, and the cattle that were in them came aft and remained in the passageways all night. The reason given by the master for not putting them
224 back in their stalls was, "Because it was already night, and I could gather none of the boards and it was impossible to fix the houses." The vessel proceeded on her course that night. The wind continued fresh and the seas increasing. I see no reason to doubt the testimony of the master and others, of claimants' witnesses, that during the night these loose cattle were more or less thrown

from one side of the passageways to the other, and one of them is shown to have been hurt fatally, though not any of the others.

The master went to bed that night at one o'clock and got up between six and seven, showing, I think, that he had not come to regard the situation as serious.

The next morning, October 31st, between eight and nine o'clock, the master stopped the vessel, repaired the pens by replacing a few boards, but leaving them without coverings, and all the loose cattle were put back into the pens, watered and fed, except the one fatally injured, and the vessel then proceeded on her course. The wind and the seas, however, increased until about two o'clock in the afternoon when the seas again broke the pens that had been repaired and the cattle came out and went loose again and collected upon the starboard side of the vessel.

The engine was then stopped, but according to the testimony of the master corroborated by other witnesses of the respondent, the wind and the sea had so increased that he was unable to put these cattle back again into pens, nor do I see that the cattlemen showed any disposition to try and do so, or to seek to have it done.

From two o'clock until about five that afternoon these loose cattle were especially exposed to the effect of the wind and sea. At this time the master anticipating and having, I think, reason to anticipate a very severe night, determined to open the gangway on the starboard side opposite No. 4 hatch, and let these loose cattle go overboard and free the vessel of them; and the result was that the above-mentioned fatally hurt ox and nine others were designedly sent overboard by the master. I find on the evidence that all these nine cattle were set loose by the sea from the stalls or pens on the port side and not by any action of the master or crew.

I also find that the only breaking down of pens and taking up of flooring and cleats by the master or crew that day or the following night were of such as were in front of the gangway opposite No. 4 hatch on the starboard side. But the evidence shows, as it appears to me, that these were removed by order of the master, and the cattle in them, I think, must have gone overboard and were designedly suffered to go overboard through this gangway. How many there were of these does not clearly appear, but I think it may be assumed that at least two of these pens covering a space of say sixteen feet in length were taken down and the flooring removed and the cattle, say at least eight, allowed to go overboard.

The following extract from the testimony of the master seems to me to point to this result:

"Q. Were the cattle that went overboard on the 31st put there or washed overboard?

"A. After opening gangway No. 4 those that were down the water washed them off.

"Q. Where were the cattle before they were washed overboard?

"A. They were there at No. 4.

"Q. In the alleyway?

"A. In the houses where they were put in here in New York.

"Q. Were they washed out of the houses by the waves?

"A. No; when the gangway was opened there was nothing there. The boards on the outside had already been washed overboard and the cattle were washed out.

"Q. Were these cattle standing up that went overboard?

"A. They were down. Some may have been up; I don't know.

"Q. I understand you to say that the cattle were not much injured on the 31st in the afternoon; they were principally injured at night?

"A. Yes; it was at night when they were badly damaged, with the exception of the ten or twelve that had come from the
226 port side opposite No. 4; those were injured."

Master's deposition, pp. 82, 83.

Although, perhaps, this testimony cannot be regarded as absolutely explicit on the subject of the cattle in these starboard pens, it is explicit in saying that the ten cattle mentioned as going over came from the port side. Then what became of those that were in the pens on the starboard side along the gangway opposite hatch No. 4? I think the indication is that they went through that gangway, and were designedly suffered to do so.

I am inclined to think that the opening of the gangway on the starboard side opposite No. 4 hatch was determined upon by the master, not merely for discharging the ten loose cattle from the port side, for why could not this have been done through the starboard gangway opposite the deck-house; but that it was a part of his preparation for the night to have this gangway opposite hatch No. 4, and the gangways on each side of the deck-house, open for the night, for the reason stated by him, that in case cattle should be carried down to either of these gangways during the night they might go overboard.

There is evidence that some of the remaining cattle did go through some of these gangways during the night, and they must, I think, be regarded as designedly suffered to go overboard.

No doubt, the night was a trying one. The master remained up all night. Nothing, apparently, could be done to relieve the situation beyond lying to in as favorable a way as possible, and so the vessel pitched and rolled all night, and the seas beat over the deck.

I am compelled to believe that the pens, except those well forward under and near the turtle-back, were very much injured, and that the cattle which these contained, or at least very many of them, suffered severely. I think I am justified in this view without accepting the extreme statements of the witnesses on either side.

On the morning of November 1st the storm had not begun
227 to abate. On the statements on the log and of the master and other witnesses on the part of the respondent, all the cattle, except the thirty-nine under or near the turtle-back, were loose, and very many of them in a wrecked and ruined condition from the effects of the storm; and the master thereupon determined to open another gangway—that on the starboard side opposite No. 3 hatch—and through these gangways thus opened to clear the deck of all the loose cattle, and in pursuance of this determination he

designedly suffered or compelled all that remained of the 126 cattle, for the loss of which this suit is brought, to go overboard.

I do not doubt the entire good faith of the master, or that he would gladly have saved the other cattle as well as the thirty-nine that remained on board. In recognizing a lack of vigorous effort or efficiency or too great apprehension or excitement, I do not deem it necessary to attribute to him any desire or purpose to sacrifice the cattle unnecessarily, and I do not think from the evidence that pens were torn down, flooring and cleats taken up to set cattle free from their pens and send them overboard, except as to the starboard pens along the gangway opposite hatch No. 4.

It was argued before me by respondent's counsel that so far as any cattle that were not fatally wounded or maimed may have gone overboard, it was a necessary incident to clearing the deck of the wrecked and ruined cattle, and ought not to be ascribed to either negligence or design on the part of the master. This view appears to me to conflict too directly with the decree of the court to admit of being entertained by me.

It is necessary, then, to consider the question as to how many of the 126 cattle so designedly sent or suffered to go overboard were fatally wounded or maimed.

The testimony of the witnesses of the respective parties on this subject is most divergent. In any view which holds that any considerable number of the cattle were fatally wounded or maimed, the testimony is as, perhaps, might naturally be expected, entirely lacking in any exactness of count. The statements of the
228 witnesses are all general and descriptive of a general condition. In regard to the ten cattle that went overboard at or near the close of the day, October 31st, there is much evidence on the part of the respondents which tends to show that they had been thrown about and injured by the rolling of the vessel after the pens, in which they had been, were broken down by the sea, and, in the opinion of the court in this case, they were referred to as being "maimed and helpless." The witness Edwards, on the part of the libellants, makes no mention of these ten cattle in any way separate from the others that were lost, nor is there anything to indicate, in his testimony, that there were any such sent overboard on that afternoon, and, of course, he makes no specific mention of the condition of any such specific cattle. The testimony of Joyce can hardly be said to make any recognition of the sending overboard of these ten cattle on Saturday afternoon, except that, in answer to a general question near the close of his testimony as to how long time was taken in sending the cattle overboard, he puts it upon two days, but otherwise his testimony makes no reference to these specific ten cattle other than the one that was fatally injured, called the white bullock. In regard to the cattle that were in the pens on the starboard side, along the gangway opposite hatch No. 4, there does not seem to be any specific mention, unless it is to be found in the extract which I have above given from the testimony of the master. It may, very likely, be that he meant to say by this testimony that these pens had been broken down by the sea and the cattle, to some

extent, thrown down and injured, but the evidence is certainly very far from being explicit or clear.

In regard to any that were carried over during the night of October 31st, I think it may be presumed that they, or very many of them, had been thrown down and fatally injured before being carried overboard through the gangways. How many went over during the night does not appear, but the fact doubtless is that by far the greater portion of the cattle that were lost were sent
229 overboard during the forenoon of November 1st. Now, in regard to the condition of the cattle on the morning of November 1st, it seems proper to refer more fully to the evidence. The log has the following:

"At twelve hours we set the mainsail, with the object of steadying the vessel. The greater portion of the oxen are down and many are carried from port to starboard, with the boards from the houses loose on account of the heavy rolling of the vessel and with a thick and heavy sea that comes on board on both sides. In this way, with the weather declared into a hurricane, we passed the balance of the night. At daylight, hurricane. All the deck is in a lamentable state; the cattle from port to starboard and from starboard to port, some with their legs broken, others dead, with so much suffering; others with their legs tangled in the rail, and some, during the night, by the blows of the sea and the rolling of the ship had gone out through the gangway to the water. On the nineteenth hour (7 a. m.) we decided to open gangway No. 3, which was done with much precaution as it was impossible to go on deck on account of the rolling and the seas that continually came in, and we immediately commenced the sad operation of throwing over all the cattle that were loose on the decks and in sorry plight, some with ropes and others dragging them to the gangway and from here the seas that were boarding us would carry them over. * * *

"On the twenty-third hour (11 a. m.) the wind carried away the mainsail, leaving nothing but the bolt ropes of the same.

"At noontime the stern was clear, there being no more cattle. There are only some remains of the houses towards the bow. The gangway No. 3 is clear, as also the hatchway. There remain on board only thirty-nine oxen and those up by the bow, forward of No. 3, which are the ones that suffered less from the effects of the hurricane." See translation of the log, pp. 3, 4 and 5.

From the testimony of the boatswain (p. 16):

230 "Q. Did you look at the cattle the next morning?

"A. Yes, the decks was a regular slaughter-house. All the cattle-houses were broken.

"Q. What was the condition of the cattle?

"A. The main portion of them were dead, and a great many were with broken legs, and some were alive over hatch No. 2 forward."

Referring to the opening of gangway No. 3, he was asked and testified:

"Q. What was the effect of opening the gangway?

"A. We fixed some ropes so as to hoist and pull over those that were dead and with legs broken, so as to pull them opposite to the gangway.

"Q. Were they washed overboard?

"A. They were, and among the dead there were also some that were alive that would jump overboard."

And at page 18:

"Q. In your judgment, if the weather had come back to ordinary conditions, could the cattle that were lost have lived or been saved?

"A. Not one of them; they were all badly injured."

This witness also testifies as to the condition of the cattle on the latter part of the 31st in the pens in the centre of the ship aft. He ays, "Some were half dead, others with broken legs."

"Q. Were the pens broken?

"A. Yes, sir" (p. 13).

And again at page 14:

"Describe fully the condition of the animals themselves?

"A. They were thrown down and could not stand up, because their legs were broken.

"Q. Were they injured in any other way?

"A. Some had their horns broken, and some were unable to rise."

The carpenter at page 34 was asked:

"Q. What was the condition of the pens and the cattle on the morning of November first?

"A. The greater portion were dead and wounded, piled up on the starboard side, and when the gangway was opened a great many were washed overboard.

"Q. Will you describe as fully as you can the condition of
231 the pens and the cattle on the morning of November 1st when you first saw them?

"A. Everything was broken and destroyed with the exception of a few houses on the forward part of the vessel. Everything was destroyed in pieces from about here (indicating No. 2 hatch) aft from about No. 2 and No. 3 forward.

"Q. Describe the condition of the cattle more fully?

"A. Some were laying on their sides, others were dead and others were wounded.

"Q. How wounded?

"A. Some had their horns broken and others were bruised by the general shaking up that they had had with the tossing back and forth of the waves.

"Q. Did you consider it dangerous to your lives to be down there where the cattle were?

"A. I have never seen anything worse before.

"Q. Was it to let this wreckage overboard that the gangway was opened?

"A. They were opened in order to give an outlet for the seas that

were coming so that they could carry away whatever was loose" (p. 35).

At page 38 this witness refers to the opening of the gangway No. 4 on the afternoon of October 31st:

"Q. In order to open the gangway No. 4, did you remove some of the pens?
"A. I believe so, but I am not sure.
"Q. How many of the cattle were thrown overboard on the 31st?
"A. I don't know."

The first officer, testifying in regard to the state of things on the afternoon of October 31st, and the stopping of the engine (p. 46):

"Q. What was the condition of the stalls and the cattle at the time that the engine was stopped?
"A. Those on the port side were in pretty bad condition from hatch No. 4 aft, and some of the boards of the houses on the starboard side had also been carried away by the seas.
"Q. In what way had the cattle suffered damage?
"A. By reason of the rolling of the vessel and the seas that continually struck it.
"Q. What damage, if any, had been done to the cattle?
232 "A. At that time, the 31st in the afternoon, they were not in a very bad state; some of them had already lain down."

Referring to the reason for opening the gangways that afternoon (p. 47):

"Q. Why was it done?
"A. So that in case the sea should be worse, the decks would be free to carry over the cattle. About five o'clock we opened the gangways on each side of the vessel opposite the houses and the one opposite the No. 4 hatch, and they were so opened so that if the weather should become worse there would be an opening for the cattle to go out" (p. 48).

Referring to the next morning, he says (p. 48):

"On the following morning, that is, the 1st of November, when it was daylight, the whole aft part of the deck was a scene of destruction.
"Q. How was it with the cattle that were forward of the deck-house?
"A. Those houses that were opposite No. 3 hatch were in the same condition of the after-houses and the oxen that had been in them had passed to the alleyways between. Most likely during the night some of them were carried away, overboard.
"Q. Were they able to stand up?
"A. They, all of them, were down, and some of them with broken legs.
"Q. Otherwise injured?
"A. During the night they suffered very much; they were continually thrown from one side to the other.

"Q. Was the crew up all night?
"A. After 4 o'clock in the morning, they were all on the bridge on the top of the house."

And at page 51:

"Q. In your opinion, could the cattle that were lost in this way have been saved, even if the weather had moderated?
"A. I don't know; they might have lived or they might not have lived; one of them that remained injured and wounded on board died in two or three days, and the same might have happened with the others.
"Q. What is your judgment about it?
233 "A. My opinion is, that after having suffered so much, I do not think they could have lived."

The master, referring to the afternoon of October 31st, when he stopped the engines, he is asked and testifies (p. 70):

"Q. What cattle pens were broken at the time you stopped?
"A. Those four were broken here that I had repaired before, and some on the starboard side, and some forward (indicating the port side).
"Q. What became of the cattle that had been in those stalls?
"A. Those that were in these houses (indicating), went wherever they could go, escaping because the weather was getting worse and they could not remain there. Those cattle I tried to arrange for placing them in other houses, but it was not possible to do so, and they came through there wherever it was room and agglomerated themselves on the starboard side.
"Q. Were the cattle wounded in any way or injured?
"A. I could not see how they were wounded, but they were damaged and they would have been lost anyhow."

Referring to his opening of the gangways, on the afternoon of October 31st, he says:

"A. Before nightfall I saw that I had to go through a tremendous hurricane according to the indications of the barometer.
"Q. How was the barometer acting?
"A. Falling.
"Q. Had you observed it frequently during the day?
"A. I observed it two or three times in the book, but many times besides. I convinced myself that I had a tremendous weather and that I was to have a hurricane that night.
"Q. And then you opened the gangway?
"A. Towards nightfall I opened the gangway of No. 4 hatch.
"Q. On the starboard side?
"A. On the starboard side and when it was opened some of the cattle went overboard. On that same night or rather the same afternoon I opened the gangways on the port and starboard side opposite the deck-house because I supposed that in the hor-
234 rible hurricane that we would have during the night the waves would break the cattle out of their places on the port

and starboard bows and carry them down to the alleyways where there was no resource for their safety. And as I thought, opening this during the night without my seeing them, but as I had expected, the cattle washed down; the waves broke the houses and washed them down. I do not know how many went over by those gangways during the night, neither do I know how many went over by gangway No. 4; what I saw was that in the morning when daylight appeared, I saw from here to here (indicating the places where the stalls are on the starboard side)—I saw there from the bridge looking over myself that many of the cattle had their legs sticking out the sides of the vessel through the rail, some one leg, others two legs, and others with all four. This must have happened without doubt during the night.

"Q. Describe the situation of affairs the next morning?

"A. In the following morning, as I have said before, a great many of the cattle had their legs outside of the rail (p. 73); the houses were broken—a few were not broken on the forward part of the ship; the cattle were all down with the exception of those towards the bow, and some were dead, others broken, others with their horns broken off, some were on their backs, making a heap of cattle and boards all mixed in one."

On the other hand, the testimony of Edwards and Joice, witnesses for the libellants, presents a very extreme case in the other direction.

Their testimony is that there was nothing severe about the wind or sea, that not a bullock need have been lost, and that all the 126 cattle were recklessly sacrificed; that the pens were recklessly torn down by the sailors and the cattle ruthlessly driven overboard at a time when they were all in a sound and healthy condition, with the exception of one—the white bullock.

After a careful reading and study of all the evidence, I am satisfied that much of the greater portion of the 126 cattle were
235 set loose by the storm, and thrown down and rolled about the deck during Saturday night and Sunday, and that it is not unreasonable to infer that at least half of all that were lost were either dead or fatally wounded, or maimed and in a hopeless condition when they were carried overboard.

The testimony does not, and probably in the nature of the case could not be expected to, furnish the means of an actual count of the exact number of the cattle that were dead or fatally injured.

In this absence of proof of any definite number, the libellants claim that there is no alternative but to hold the respondents liable for all that were lost.

I think, however, that in such a case as this it is but reasonable to try and determine the reasonable proportions of those that were dead or fatally wounded and maimed to those that were not.

The extremes of testimony are, on the one hand, that all the cattle that went overboard were, with the exception of one, in a good condition, and that not one of them should have been lost; and, on the other hand, that they were all dead or injured past recovery.

My conclusion from the whole evidence is in favor of the probability that the proportions between the dead and the fatally maimed and wounded on the one hand and those that were alive and not fatally maimed or wounded on the other are about equal.

And in pursuance of this conclusion, I find and report libellants' damages as follows:

For loss of 63 cattle of the value at the port of New York of $79 a head	$4,977 00
For freight paid in advance on 126 cattle, there having been a failure to carry and deliver same, at $12.10	1,524 60
	$6,501 60
(See on this item Phelps *v.* Williamson, 5 Sandf., 578.)	
For interest from Nov. 7th, 1891, to Feb. 6th, 1894	876 63
	$7,348 24
236 It was proved before me that libellants paid for insurance on all the 126 cattle $1.575 per head, making	$198 45

Also that libellants incurred expenses for feed for the seven days before they were lost, as follows:

For hay, 15 lbs. per day per head, making for 126 head 13,230 lbs., at 82½ cents per 100	$109 15
Corn, 10 lbs. per day per head, 8,820 lbs., at $1.22½ per 100	108 05

These three items last named I do not allow, for the reason that I have not been able to find any authority for doing so. I, however, report the facts as to these items, so that in case the court should regard them, or any portion of them, as proper to be allowed, the correction can be made by the court on the face of my report.

I have accordingly ascertained and report the libellants' damages to be seven thousand three hundred and seventy-eight and $\frac{24}{100}$ dollars.

All of which is respectfully submitted.

Dated New York, Feb. 6th, 1894.

ENOS N. TAFT,
U. S. Commissioner.

(Endorsed:) Report of commissioner on reference to compute damages. Filed Feb'y 12, 1894.

237 United States District Court, Southern District of New York.

WILLIAM W. BRAUER and Others
against
COMPANIA DE NAVIGACION LA FLECHA.

The libellants make and file the following exceptions to the report of the commissioner, filed in the office of the clerk of this court on the 12th day of February, 1894:

First. The libellants except to so much of the report as limits libellants' recovery to the value of 63 cattle, whereas the said commissioner should have reported that the libellant- *was* entitled to recover the value of 126 cattle.

Second. The libellants except to the refusal of the commissioner to allow the item of $198.45 for insurance on the cattle lost, and the items of $109.15 and $108.15 for the libellants' expenses for feed to the cattle for the seven days before they were lost.

MACFARLAND & PARKIN,
Proctors for Libellants.

(Endorsed:) Exceptions to report of commissioner. Filed Feb'y 14, 1894.

238 District Court of the United States, Southern District of New York.

W. W. BRAUER *et al.*
against
COMPANIA DE NAVIGACION LA FLECHA.

The libellants except to the report of the commissioner herein as follows:

1st. In that the commissioner finds that the vessel encountered a period of great severity of wind and sea.

2d. In that the commissioner finds that nine of the cattle were set loose from the pens or stalls on the port side on the afternoon of October 31st, by the action of the seas and not by any action of the master or crew.

3d. In that the commissioner finds that the only breaking down of pens and taking up of flooring and cleats by the master or crew on October 31st or the following night were of such as were in front of the gangway opposite No. 4 hatch on the starboard side.

4. In that the commissioner finds that the pens on the starboard side so torn down by the master and crew were only two in number, and only the eight cattle in these two pens allowed to go overboard.

5th. In that the commissioner finds that the vessel pitched and rolled during the night of October 31st and the seas beat over her deck.

6th. In that the commissioner finds that the pens were not torn down and the flooring and cleats not taken up to set cattle free from their pens and send them overboard, except as to the starboard pens along the gangway opposite hatch No. 4.

239 7th. In that the commissioner finds that half of all the cattle that were lost were either dead or fatally wounded or maimed and in a hopeless condition when they were carried overboard.

8th. In that the commissioner finds that the libellants are only entitled to recover 63 head of cattle, whereas he should have found that the libellants were entitled to recover for 126 head of cattle.

9th. In that the commissioner did not report damages in a greater sum than $6,501.60 and interest accordingly.

10th. In that the commissioner finds that the libellants are not entitled to recover the premiums of insurance paid on the 126 head of cattle which were lost.

11th. In that the commissioner finds that the libellants are not entitled to recover the amount paid for hay and corn fed to the cattle which were lost.

MacFARLAND & PARKIN,
Libellants' Proctors.

(Endorsed:) Amended exceptions to report of commissioner. Filed Feb'y 15, 1894.

240 District Court of the United States for the Southern District of New York.

WILLIAM W. BRAUER and Others, Libellants,
against
THE COMPANIA DE NAVIGACION LA FLECHA.

Exceptions to Commissioner's Report Filed by the Respondent.

The respondent excepts as follows to the report filed herein by Enos N. Taft, commissioner, upon the following grounds:

First. For that the said commissioner found that the cattle in the pens on the starboard side along the gangway opposite hatch No. 4 were designedly suffered to go overboard.

Second. For that the said commissioner found that the cattle in the pens on the starboard side along the gangway opposite hatch No. 4 were designedly suffered to go overboard, and that they were of the value of $79 a head, or of any value whatsoever.

Third. For that the said commissioner found that the libellants are entitled to damages for the loss of 63 cattle of the value of $79 a head, or for any cattle whatsoever.

Fourth. For that the said commissioner found that the libellants *were* entitled to recover freight paid in advance on 126 cattle at the rate of $12.10 a head, or for any freight whatsoever.

241 Fifth. For that the said commissioner did not report damages in a smaller principal amount than $6,501.60, and interest accordingly.

Sixth. For that the said commissioner did not report that the libellants had not sustained damages in any amount whatsoever.

Seventh. For that the said commissioner has reported damages in respect to cattle not fatally wounded or maimed which were lost incidentally to clearing the deck of the wrecked and ruined cattle.

Eighth. For that the said commissioner has found that the live cattle not fatally wounded which went overboard were 63 in number.

Ninth. And for that he has found the value of such cattle to be $79 per head.

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent.

(Endorsed:) Exceptions to commissioner's report. Filed Feb'y 15, 1894.

242 United States District Court, Southern District of New York.

WILLIAM W. BRAUER and Others
vs.
COMPANIA DE NAVIGACION LA FLECHA.

Memorandum.

MacFarland & Parkin for the libellants.
Butler, Stillman & Hubbard for the respondents.

BROWN, *J.*:

(1.) As respects the number of cattle lost through the misconduct of those on board the *Hugo*, the testimony presents such extreme difficulties that I do not find sufficient warrant for departing from the finding of the commissioner, having no confidence that any different finding that I might make on that point would be any more nearly accurate or just than the commissioner's finding.

(2.) The damages for the loss of the 63 cattle being estimated in the same manner as upon a total destruction of cargo at sea in collision cases, viz: the market value of the articles at the place of shipment, with interest and expenses of transportation (The *Ocean Queen*, 5 Blatch., 493), I think the libellants are entitled to recover, in addition to the market price in New York, as fixed by the commissioner, the advanced freight also on the 63 cattle lost (not on the 126), and in addition thereto the proportion of insurance premiums paid, and the cost of feed for the 63 cattle, with interest; both of those items being necessary, or reasonable and proper expenses and charges, which should, therefore, be added to the market value at the place of departure. The *Scotland*, 105 U. S., 24, 35; The
243 *Aleppo*, 7 Ben., 121. The exceptions in the bill of lading do not extend to cases of losses by negligence, or misconduct, as is here found in regard to the 63 cattle; though they do apply to the residue of the loss through sea perils.

As above modified, the report is confirmed.

New York, April 26, 1894.

At a stated term of the district court of the United States for the southern district of New York, held in the United States court-rooms, in the post-office building in the city of New York, on the 7th day of May, 1894.

Present: Hon. Addison Brown, district judge.

WILLIAM W. BRAUER *et al.*
against
COMPANIA DE NAVIGACION LA FLECHA.

The report of Enos N. Taft, Esq., the commissioner to whom it was referred by the interlocutory decree herein to ascertain and report the libellants' damages herein, having been filed, and exceptions thereto having been duly filed by the libellants and respondents, and the cause having come on to be heard on said exceptions, and having been argued by counsel for the respective parties, and due deliberation having been had:

It is ordered, adjudged and decreed that the libellants are entitled to recover from the respondents the value of 63 head of cattle, as ascertained and reported by the commissioner, together with freight prepaid on said 63 head of cattle, and the proportion
244 of insurance premiums paid, and cost of feed therefor, with interest from November 7th, 1891, to the date of this decree; and it appearing from the report of said commissioner that the said several sums amount together, to the sum of $5,947.43;

It is further ordered, adjudged and decreed that the defendant pay to the libellants the sum of $5,947.43, with interest from November 7th, 1891, amounting to $892.11, making together, at the date hereof, the sum of $6,839.54, and the sum of $264.78, the libellant's costs as taxed, the said sums together amounting to the sum of $7,104.32.

ADDISON BROWN.

(Endorsed:) Decree. Filed May 7, 1894.

District Court of the United States, Southern District of New York.

WILLIAM W. BRAUER, FREDERICK C. BRAUER, and THE RELIANCE MARINE INSURANCE COMPANY, LIMITED,
against
COMPANIA DE NAVIGACION LA FLECHA.

Please take notice that the libellants, William W. Brauer, Frederick C. Brauer and The Reliance Marine Insurance Company, Limited, hereby appeal to the United States circuit court of appeals for the second circuit, from so much of the final decree entered herein on the 7th day of May, 1894, as limits their recovery to the value of 63 head of cattle with the freight prepaid thereon, and the cost of feed, and the premium of insurance therefor, and from so much as provides that the defendant pay to the libellants
245 the sum of $5,947.43, with interest from November 7th, 1891, and limits the amount to be paid to said sum.

Dated New York, May 11th, 1894.

Yours, &c., MACFARLAND & PARKIN,
Libellants' Proctors.

To Samuel H. Lyman, Esq., clerk; Messrs. Butler, Stillman & Hubbard, proctors for respondent.

(Endorsed:) Notice of appeal. Filed May 11, 1894.

United States District Court, Southern District of New York.

WILLIAM W. BRAUER *et al.*
against
COMPANIA DE NAVIGACION LA FLECHA.

GENTLEMEN: Please take notice that the respondent above named Compania de Navigacion la Flecha, hereby appeals to the United States circuit court of appeals for the second judicial circuit from the final decree entered herein on the 7th day of May, 1894, and from each and every part of the said decree.

Dated New York, May 10th, 1894.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent.

To Samuel H. Lyman, clerk; Messrs. MacFarland & Parkin, proctors for libellants.

(Endorsed:) Notice of appeal. Filed May 11, 1894.

246 District Court of the United States, Southern District of New York.

WILLIAM W. BRAUER *et al.*
against
COMPANIA DE NAVIGACION LA FLECHA.

The libellants assign error as follows:

First. The court erred in holding that the vessel was properly navigated.

Second. The court erred in holding that any of the cattle were necessarily sacrificed.

Third. The court erred in holding that any of the cattle were fatally wounded or maimed, or in a dead or dying condition, when thrown overboard.

Fourth. The court erred in not holding that the libellants were entitled to recover for all the 126 cattle.

Fifth. The court erred in limiting the libellants' damages to the value of 63 cattle with the prepaid freight thereon, and the cost of feed and insurance premium.

MACFARLAND & PARKIN,
Libellants' Proctors.

(Endorsed:) Libellants' assignments of error. Filed June 11, 1894.

247 District Court of United States for the Southern District of New York.

WILLIAM W. BRAUER and Others, Libellants,
against
COMPANIA DE NAVIGACION LA FLECHA, Respondent.

The respondent assigns error as follows:

First. The libel herein should have been dismissed with costs.

Second. The clause in the bill of lading to the effect that the contract should be governed by English law, with reference to which law the contract was made, should have been sustained, and the libel accordingly dismissed..

Third. The clause in the bill of lading to the effect that the cattle were carried on deck at owner's risk and the steamer not to be held accountable for accident to or mortality of the animals from whatsoever cause arising, should have been sustained, and the libel accordingly dismissed.

Fourth. The clause in the bill of lading to the effect that the carrier should not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by accident of navigation of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship-owner, not resulting, however, from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager, should have been sustained, and the libel accordingly dismissed.

248 Fifth. The court erred in holding that the vessel was not in any peril, and that there was no such actual hurricane, or any such extraordinary storm, as the language of the log or the testimony of the officers would indicate.

Sixth. The court erred in holding that the sacrifice of a considerable number of live cattle that were not maimed or substantially hurt was made on the morning of Sunday, the 1st of November, not from any pressing necessity, but solely from mere apprehension, and that there was no reasonable or apparent necessity for the sacrifice.

Seventh. The court erred in holding the clause in the bill of lading that the cattle were to be at owner's risk, and steamer not to be held accountable for accident to or mortality of the animals from whatever cause arising, or for negligence of the master or other servants of the ship-owner, to be invalid.

Eighth. The court erred in holding the clause in the bill of lading to the effect that the contract should be governed by English law, with reference to which law the contract was made, to be invalid.

Ninth. The court erred in holding that the libellants were entitled to a decree for damages for such of the oxen voluntarily sacrificed as were either in a sound condition, or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st or on the evening of the night previous.

Tenth. The court erred in holding that any cattle were negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, or on the evening of the night previous.

Eleventh. The court erred in directing the commissioner,
249 to whom reference was made to assess libellants' damages to assess damages for such of the oxen as were of any market value, or not fatally wounded or maimed at the time when the houses and cleats provided for them were designedly torn up and which were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, and on the evening and night previous.

Twelfth. The court erred in allowing the libellants to recover any amount in respect to the freight prepaid, or in respect to the cost of food or maintenance of the cattle.

Thirteenth. The court erred in finding that the libellants had sustained any damage whatsoever.

Fourteenth. The court erred in making any decree against the respondents.

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent & Appellant.

(Endorsed:) Respondent's assignments of error. Filed May 25, 1894.

250 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

WILLIAM W. BRAUER *et al.*, Lib'l'ts & Appellants,
vs.
THE COMPANIA NAVIGACION LA FLECHA, Resp'd't & Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America, for the southern district of New York, do hereby certify, that the foregoing is a correct transcript of the record of the district court in the above-entitled cause, made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals, for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the
[SEAL.] southern district of New York, this 25th day of June, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and eighteenth.

SAM'L H. LYMAN, *Clerk.*

251 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM W. BRAUER and Others
vs.
COMPANIA DE NAVIGACION LA FLECHA.

SHIPMAN, *C. J.*:

The libellants, being the persons who constituted the firm of W. W. Brauer & Company and the Reliance Marine Insurance Company, brought their libel before the United States district court for the southern district of New York, against the Campania de Navigacion la Flecha, a Spanish corporation, and the owner of the steamship "Hugo," in which libel they alleged that on October 24th, 1891, William W. Brauer & Company, being the owner of 165 head of cattle, shipped the same in good order and condition on board the steamship "Hugo," then lying in the port of New York and bound to the port of Liverpool, in England, and to be carried to said port, and that the shippers thereupon received from the master or agent of said steamer a bill of lading, whereby he undertook on behalf of the owner of said vessel to carry the cattle to Liverpool, and there to deliver the same to the said shippers or their order, they paying freight therefor.

That on or about October 31st, 1891, the said vessel, while on her voyage to Liverpool, with the cattle on board, having encountered rough weather, the master and crew of said vessel became panic-stricken and drove overboard one hundred and twenty-six head of cattle; that the act of said master and crew in driving overboard said cattle was wholly unnecessary.

Thereafter the vessel arrived safely in the port of Liver-
252 pool, and delivered to the shippers or their agents 38 of said cattle in good condition (one having died), but failed to deliver the 126 head, whereby the libellants sustained damage.

The respondent, in its answer, admitted that one hundred and twenty-six head of cattle were lost, but averred that by the terms and conditions of the contract and bill of lading, under which the cattle were received for transportation and delivery, it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond his control, by the perils of the seas or other waters, or by other accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the master, mariners or other servants of the ship-owner, and that the cattle were carried on deck at the owner's risk, and under a special provision that the steamer should not be held accountable for accident to or mortality of the animals from whatsoever cause arising. There was a further provision that the contract should be construed and governed by the laws administered in the courts of Great Britain, with reference to which law the contract was made.

And that the loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattle-houses, and set the cattle adrift, and that during the continuance of the perils, and by reason thereof, certain of the cattle were washed

overboard, and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or hopeless condition, and that upon such being taken to the gangways, they were washed over by the seas.

And that the care given to said cattle was according to the best judgment of the master of said steamer, and that if he erred in his judgment or was in any degree negligent, the respondent was absolved from accountability and responsibility by reason of the terms of the bill of lading, and by the law, as administered in the courts of Great Britain.

253 The history, in outline, of the three days during which the events in controversy occurred, is stated by the district judge as follows:

"The steamer sailed from this port on the 24th of October. During three days, from October 30th to November 1st, inclusive, the vessel met heavy weather, during which there was heavy rolling of the vessel. The cattle were in pens on deck; a few forward under and near the turtle-back, which were saved; the rest were in the vicinity of Nos. 3 and 4 hatches, forward and aft of the engine-room, in pens built in the wings on the port and starboard sides of the ship, all of which were lost. The storm was heaviest on the afternoon and night of Saturday, the 31st, the wind and seas coming first, and heaviest, from the northwest, but on Saturday hauling to the northward and to east-northeast, with cross-seas. Some slight damage was done to a few pens on the 30th; more were broken on Saturday, the 31st; but these were repaired and the cattle put in place toward nightfall. About 5 o'clock on that day the after gangways were opened on each side, and about ten or twelve cattle that had become maimed and helpless were sent overboard through those gangways. The chief loss was during that night and the following morning, when, shortly after daylight, the captain gave orders to open the forward gangways also and the whole deck was cleared of all the cattle, save the 39 under the turtle-back.

"The principal questions of fact in dispute which arose under this general statement were as to the character and severity of the storm and the necessity which existed for the drowning of the cattle, and, if there was an absence of necessity, whether the conduct of the captain in clearing the decks of the entire number of cattle, except those under the turtle-back, was or was not a destruction of property which could not be characterized as resulting from negligence or the accidents of navigation. The libellants also introduced expert testimony to show that the judgment of the master, in regard to the navigation of the ship at the time of the storm, was defective, and that the ship was badly handled."

The district judge, having quoted at length from the testimony and stated the various considerations which influenced his mind, came to the following conclusions upon the questions of fact:

"Upon the whole testimony in this pitiful case, I am not
254 disposed to pronounce any unfavorable judgment upon the handling of the ship by the master. His record as a master appears to have been good, and on any doubtful question of navi-

gation he is entitled to the benefit of his record. He had some, though not large, experience in the transportation of cattle, and the experts called by each party place so much stress upon the special circumstances of the situation, the quality of the ship and the necessary determination of the master's own judgment at the time that in the circumstances testified to I do not find any conclusive proof adverse to the master's judgment as to the navigation of the ship.

"The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were not maimed or substantially hurt was made on the morning of Sunday, the 1st of November, not from any pressing necessity, but solely from mere apprehension; and I am further persuaded that there was no reasonable or apparent necessity for the sacrifice. It was morning. The night was past. No one testifies to any pressing peril to the ship. The log does not hint of it. To reason appears why such cattle as could go about, and were actually going about, should not have been cared for and preserved. There was plainly no effort made to separate the sound from the maimed. Even the master says, in answer to the question, 'Were these cattle standing up that went overboard? A. They were down. Some may have been up; I don't know.'

"His object plainly was to clear the deck of all the cattle from No. 3 aft, with no attempt to discriminate or to save any. His state of mind is shown by his concluding words: 'We all breathed happily when we saw it open' (No. 3 hatch)."

His legal conclusion was that the libellants were entitled to a decree, and a reference was had to a commission to report the damages, for such of the oxen as were of any market value, and not fatally wounded or maimed at the time when the houses and cleates provided for them were designedly torn up, and which were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st and on the evening and night previous.

255 The commissioner heard some additional testimony from one of the two cattlemen who had previously testified, reexamined all the evidence before the district court, and made a lengthy report. His history of the last two days of the storm and of the destruction of the cattle is so full, and is stated with such care, that it is quoted *in extenso*:

"The next morning, October 31st, between eight and nine o'clock, the master stopped the vessel, repaired the pens by replacing a few boards, but leaving them without coverings, and all the loose cattle were put back into the pens, watered and fed, except the one fatally injured, and the vessel then proceeded on her course. The wind and the seas, however, increased until about two o'clock in the afternoon, when the seas again broke the pens that had been repaired, and the cattle came out and went loose again and collected upon the starboard side of the vessel.

"The engine was then stopped; but, according to the testimony of the master, corroborated by other witnesses of the respondent,

the wind and the sea had so increased that he was unable to put these cattle back again into pens, nor do I see that the cattlemen showed any disposition to try and do so, or to seek to have it done.

"From two o'clock until about five that afternoon these loose cattle were especially exposed to the effect of the wind and sea. At this time the master, anticipating and having, I think, reason to anticipate a very severe night, determined to open the gangway on the starboard side opposite No. 4 hatch, and let these loose cattle go overboard and free the vessel of them; and the result was that the above-mentioned fatally hurt ox and nine others were designedly sent overboard by the master. I find on the evidence that all these nine cattle were set loose by the sea from the stalls or pens on the port side, and not by the action of the master or crew.

"I also find that the only breaking down of pens and taking up of flooring and cleats by the master or crew that day or the following night were such as were in front of the gangway opposite No. 4 hatch on the starboard side. But the evidence shows, as it appears to me, that these were removed by order of the master, and the cattle in them, I think, must have gone overboard, and were designedly suffered to go overboard through this gangway. How many
256 there were of these does not clearly appear, but I think it may be assumed that at least two of these pens, covering a space of say sixteen feet in length, were taken down and the flooring removed, and the cattle, say at least eight, allowed to go overboard.

"I am inclined to think that the opening of the gangway on the starboard side opposite No. 4 hatch was determined upon by the master, not merely for the discharging the ten loose cattle from the port side, for why could not this have been done through the starboard gangway, opposite the deck-house; but that it was a part of his preparation for the night, to have this gangway opposite hatch No. 4, and the gangways on each side of the deck-house, open for the night, for the reason stated by him—that in case cattle should be carried down to either of these gangways during the night they might go overboard.

"There is evidence that some of the remaining cattle did go through some of these gangways during the night, and they must, I think, be regarded as designedly suffered to go overboard.

"No doubt the night was a trying one. The master remained up all night. Nothing, apparently, could be done to relieve the situation beyond lying to in as favorable a way as possible, and so the vessel pitched and rolled all night, and the seas beat over the deck.

"I am compelled to believe that the pens, except those well forward under and near the turtle-back, were very much injured, and that the cattle which these contained, or at least very many of them, suffered severely. I think I am justified in this view without accepting the extreme statements of the witnesses on either side.

"On the morning of November 1st, the storm had not begun to

abate. On the statements on the log and of the master and other witnesses on the part of respondent, all the cattle except the thirty-nine under or near the turtle-back, were loose, and very many of them in a wrecked and ruined condition from the effects of the storm; and the master thereupon determined to open another gangway—that on the starboard side opposite No. 3 hatch, and through these gangways thus opened to clear the deck of all the loose cattle, and in pursuance of this determination, he designedly suffered or compelled all that remained of the 126 cattle, for the loss of which this suit is brought, to go overboard."

257 His conclusion was "in favor of the probability that the proportions between the dead and the fatally maimed and wounded on the one hand, and those that were alive and not fatally maimed or wounded on the other, are about equal."

The damages resulting from the destruction of sixty-three head of cattle, amounting to $6,839.54, were decreed by this court in favor of the libellants with costs. From this decree each party appealed.

The questions in this case are mainly those of fact, for when the facts and the reasons which directed the captain's conduct are clearly settled, the questions of law are not perplexing. It cannot be denied that the ultimate facts are not easy of ascertainment. The witnesses for the libellants were two of the cattlemen, with manifest and strong prejudice against the captain and crew, and with a desire to protect themselves from the charge of having skulked during the storm.

On the other hand, all the respondent's witnesses, except the chief engineer, were foreigners, who spoke through an interpreter. Mudie, the chief engineer, was a Scotchman, and although he saw what was done on Sunday morning, he was not questioned upon that subject. The oral testimony of all who testified in regard to the condition of the cattle was much exaggerated, and the circumstances and the probabilities resulting therefrom must be our guide in coming to a conclusion.

The facts which appear to us to give character to the acts of the master are the following:

Before the night of the 31st the cattle had received but little damage. The district judge finds that before nightfall the pens were repaired and the loose cattle were put back in their places. The carpenter testified to this, but the testimony of the captain and other witnesses for the respondent is to the effect that on this afternoon they could not put the cattle back in their pens, and as this part of the history is not of vital importance, and we prefer to base our conclusions upon facts substantially proven, we express no opinion upon this point. But it is true that about five

258 o'clock on the afternoon of the 31st the captain took up the flooring and cleats in two pens, containing eight cattle, in front of the gangway opposite No. 4 hatch on the starboard side. This was done not merely to discharge the ten loose cattle on the port side, one of which was fatally injured, and perhaps the others, who were also designedly sent overboard, were maimed; but this

gangway was opened and left open for the night, so that the cattle might easily be carried down to it and might go overboard. The fact that the flooring and cleats were taken up so that the cattle might have no foothold during the night, but be carried down to the gangway by the rolling of the ship, is significant that the captain wanted to expedite the delivery of cattle into the ocean. He wanted this not for the safety of the ship or to end the sufferings of maimed cattle. The preparations were made so that sound as well as maimed cattle could be washed overboard. Whether during the night sound cattle were actually washed overboard cannot be known with certainty. On Sunday morning the testimony makes it apparent that the master determined to rid the ship of every head of cattle except those under the turtle-back. He intended to clear the decks of cattle whether well or injured, and no effort was made "to separate the sound from the maimed." The cattle not injured were pushed or prodded and driven across the slippery iron deck, and were hurried over the gangways as rapidly as possible and in a short space of time. "No attempt was made to discriminate or to save any," because the master and the crew wanted none saved. We concur with the district judge in the conclusion that there was "no reasonable or apparent necessity" for the non-existence of an attempt to separate the two classes. There was a storm, but nothing belonging to the ship was injured. No one testifies that anything was loosened or unshipped or that there was any leakage, and no one claims that she was in pressing peril. The sacrifice was not to save the vessel or her cargo, but the presence of the cattle during the storm was a great inconvenience and
259 there was, as found by the district judge, an apprehension that the storm would continue, and that the existing inconvenience would be increased. The reason for throwing both sound and maimed cattle overboard was a great dissatisfaction with the existing state of the decks, an apprehension that the same state of things would continue, and a determination to put an end to trouble from cattle.

The commissioner has found that it is impossible to tell, with mathematical accuracy, the number which were thus sacrificed. That some were injured and perhaps some were incapable of moving themselves is, perhaps, apparent from the time which was taken to clear the ship, while the work was hindered by the storm. The work commenced between six and seven and was finished at eleven. That a pile of dead or maimed cattle should be removed in that time, during the storm, by the aid of a donkey engine, is improbable. But for the very careful study of the question by the experienced commissioner we should be inclined to place the number of the uninjured at a higher figure than he did, but the testimony has no such approximation to accuracy as to enable us to say that he was wrong. In view of the fact, which is undoubtedly true, that fatally injured cattle were properly thrown overboard, the libellants' claim is not well founded that, in the absence of proof by the respondent of any definite number, it must be held liable for all that were lost. It is not reasonable to suppose that, under the circum-

stances which have been described, accuracy, in regard to the number of the sound cattle which were designedly permitted to go overboard, was attainable. It is both reasonable and just to endeavor to ascertain the number with as near approach to accuracy as the testimony will permit, and not to solve the question with known inaccuracy by throwing the entire loss upon the carrier.

The respondent relies for freedom from liability upon the terms of its contract, which are claimed to furnish immunity from the acts of the captain.

The bill of lading declares that the cattle were shipped "on
260 deck at owner's risk, steamer not to be held accountable for accident to or mortality of the animals from whatsoever cause arising." The acts which drove the sixty-three animals into the ocean were not an accident, neither is the destruction by the same violence to be regarded as the "mortality" to which the rest of the clause relates. The respondent had undertaken to transport the animals safely to Liverpool; its agents had taken charge of them and entered upon the service; the clause relieving the carrier from liability in the case of mortality has no relation to the consequences of the violence which pushed the animals into the ocean.

But the respondent relies chiefly upon the provision which relieved the carrier from liability for losses "occasioned by causes beyond his control, by the perils of the sea * * * by accidents of navigation of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the ship-owner," and by the provision which declared that the contract should be governed by British law, with reference to which it was made. Waiving the question, whether at the time when the contract was made contracts which relieved carriers by sea from the consequences of the negligence of the master, were not void as against the public policy of this country, the acts of the master and crew of the "Hugo" in regard to the sixty-three cattle, were not occasioned by an accident of navigation caused either by the negligence or error in judgment of the master. It was an entire clearance of the decks, without apparent necessity, and with no attempt to discriminate or save any. There was no pretense that it was to save the ship or the cargo, or that it was necessary to sacrifice these animals for the benefit of the survivors. While the defense upon the facts is that the animals thrown into the ocean were either dead or so maimed, or so helpless, that they could not live, and there is no claim that sound animals slipped into the sea, either by negligence or were thrown into the sea through error of judgment in regard to their condition, yet,
if it is found that this defense is not sustained, and that the
261 master intentionally caused the drowning of sound cattle, the respondent insists that it is to be relieved, because such determination of the captain was the fruit of an error of judgment.

The reasons which actuated the master have already been stated. He had an apprehension of a continuance of the storm, and he consequently had an apprehension that more cattle might be injured, but he also had a deep sense of the inconveniences to which his

cargo on deck subjected him, and the combined emotions were significantly suggested by the assertion, "We all breathed happily when we saw No. 3 hatch open." The act of the master was not the result of an opinion that the drowning of the sound cattle was called for by prudential considerations for the ultimate safety of the lives or the property in his charge.

The question remains whether, apart from the question of negligence, the loss was occasioned by one of the excepted causes of calamity. The injury to and the drowning of the maimed animals were caused by the perils of the sea. Under the facts, as found by this court, non-delivery of the sound cattle was not caused by a peril of the sea or the accidents of navigation, or circumstances properly incident to navigation. The master's unfounded but existing apprehension in regard to the future relieves his conduct from a charge of barratry. There was a destruction of property, but it was not so much tainted with dishonest views or fraudulent breach of trust as to come within the definition of barratrous conduct.

The respondent offered proof of the British law as announced by English decisions, which permits the ship-owner to relieve himself, by express contract, from the consequences of the negligence of his captain or crew, but no decision touches with any closeness the state of facts which are disclosed in this record, and we are left to decide, without the aid of English authorities, the question whether the acts of the master which caused the non-delivery of sixty-three cattle were within the clauses in the bill of lading which freed the ship-owner from liability.

262 The respondent's counsel has presented the point in his brief that the commissioner and the district court erred in the assessment of damages, because the market price of the cattle should have been taken at the port of destination, instead of at the port of New York, with freight and cost of maintenance.

It is sufficient to say that this point was not presented in the assignment of errors; neither was it presented to the district court in either of the exceptions to the commissioner's report. The question seems to have been raised in this court for the first time.

The decree of the district court is affirmed without costs in this court, in favor of either appellant.

Wm. W. MacFarland, for the libellants; Wilhelmus Mynderse, for the respondent.

(Endorsed:) U. S. circuit court of appeals for the second circuit. Wm. W. Brauer *et al. vs.* Compania de Navigacion la Flecha. Opinion, Shipman, C. J. United States circuit court of appeals, second circuit. Filed March 5th, 1895. James C. Reed, clerk.

U. S. Circuit Court of Appeals, Second Circuit.

BRAUER *et al.*
vs.
COMPANIA DE NAVIGACION LA FLECHA.

WALLACE, *C. J.*:

I dissent from the opinion of the majority of the court.
263 I do not think that the master sacrificed the uninjured cattle simply for the sake of the comfort and convenience of the ship. I agree with the commissioner when he says: "I do not doubt the entire good faith of the master, and that he would gladly have saved the other cattle as well as the thirty-nine that remained on board." The theory of the libel is that the master and crew of the vessel became "panic-stricken" and drove the cattle overboard; and the evidence more nearly supports this theory than the one which has been adopted. I think a prudent regard for the safety of the ship and crew, in view of the situation as it was at the time, justified him in clearing the deck of the mass of dead and wounded cattle, and that it is idle to say that there was any practicable opportunity upon that storm-swept deck to separate the dead cattle from the wounded and dangerous live ones. After the event, and with the wisdom which comes from retrospect, it is not difficult to conjecture, in case of disaster, what might have been done that was not done, but I am satisfied from the proofs that the master did everything which a prudent and honest navigator would have done under the circumstances from the time he hove to his vessel until the hurricane was over, and that the loss of the cattle was caused by perils of the sea, and, therefore, within one of the excepted risks of the bill of lading.

(Endorsed:) U. S. cir. ct. of appeals, second cir. Brauer *et al. vs.* Compania de Navigacion la Flecha. Wallace, C. J. United States circuit court of appeals, second circuit. Filed Mar. 5, 1895. James C. Reed, clerk.

264 At a stated term of the United States circuit court of appeals, held in and for the second circuit, at the court-rooms, in the city of New York, on the 18th day of March, 1895.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

WILLIAM W. BRAUER *et al.*
against
COMPANIA DE NAVEGACION LA FLECHA.

This cause having come on to be heard on appeal on the transcript of record sent up from the district court of the United States in and for the southern district of New York, and having been argued and submitted by the respective advocates, and due deliberation being had, now, on motion of MacFarland & Parkin, proctors for libellants, it is—

Ordered, that the decree so appealed from be, and the same hereby is, affirmed, without costs in this court to either party. And it is further—

Ordered, that a mandate issue accordingly forthwith to the said district court of the United States for the southern district of New York, commanding the said district court to take such further proceedings in said cause as according to law and justice and the laws of the United States ought to be had in conformity with this order.

W. J. W.
E. H. L.
N. S.

265 SIRS: Please take notice that on the 11th day of March, 1895, at 10.30 a. m., or as soon thereafter as counsel can be heard, we shall present an order, a copy of which is hereby served upon you, to the judges of this court for settlement.

Yours, etc., MACFARLAND & PARKIN,
Proctors for Libellants.

To Messrs. Butler, Stillman & Hubbard, proctors for respondents.

(Endorsed:) U. S. circuit court of appeals. William W. Brauer *et al.* against Compania de Navigacion la Flecha. Order for mandate and notice of settlement. MacFarland and Parkin, proc's for lib'ts, 22 William St., New York city. United States circuit court of appeals, second circuit. Filed Mar. 18, 1895. James C. Reed, clerk.

266 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 265 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of William W. Brauer, Frederick C. Brauer and The Reliance Marine Insurance Company, Limited, of Liverpool, libellants and appellants, against Compania de Navigacion la Flecha, respondent and appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of March, in the year of our Lord one thousand eight hundred and ninety-five and of the Independence of the said United States the one hundred and nineteenth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

267 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which William W. Brauer and Frederick C. Brauer, copartners, doing business under the firm name of W. W. Brauer & Company, and The Reliance Marine Insurance Company, Limited of Liverpool were libellants and appellants and Compania de Navigacion la Flecha was respondent and appellant, which suit was removed into said circuit court of appeals by virtue of an appeal and cross-appeal from the district court of the United States for the southern district of New York, *and* we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
268 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss*:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify that the following pages, numbered from 4 to 5, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of William W. Brauer, Frederick C. Brauer, and The Reliance Marine Insurance Company, Limited, of Liverpool, libellants and appellants, against Compania de Navigacion la Flecha, respondent and appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 16th day of April, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

269 [Endorsed:] Supreme Court of the United States, October term, 1894. No. 965. William W. Brauer *et al. vs.* Compania de Navigacion la Flecha. Writ of certiorari.

270 United States Circuit Court of Appeals for the Second Judicial Circuit.

WILLIAM W. BRAUER, FREDERICK C. BRAUER, and THE RELIANCE MARINE INSURANCE COMPANY, LIMITED, Libellants,
against
COMPANIA DE NAVEGACION LA FLECHA, Respondent.

It is hereby stipulated and agreed by and between the proctors for the respective parties to the above-entitled cause that the record certified from this court and filed in the Supreme Court of the United States, with respondent's petition for a writ of certiorari, be taken and deemed as the record returned from this court under said writ, and that the said writ be returned to the Supreme Court of the United States, with this stipulation or a duly certified copy thereof attached.

New York, April 11, 1895.

MACFARLAND & PARKIN,
Proctors for Libellants.
BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent.

271 [Endorsed:] U. S. circuit court of appeals, second judicial circuit. William W. Brauer, Frederick C. Brauer, and The Reliance Marine Insurance Company, L't'd, *vs.* Compania de Navegacion la Flecha. Stipulation. Butler, Stillman & Hubbard, proctors for respondent, 54 Wall street, New York city.

[Stamped:] United States circuit court of appeals, second circuit. Filed Apr. 16, 1895. James C. Reed, clerk.

272 [Endorsed:] Case No. 15,849. Supreme Court U. S., October term, 1896. Term No., 249. Wm. W. Brauer *et al.*, app'ts, *vs.* Compania de Navigacion la Flecha. Writ of certiorari and return.

[Stamped:] Office Supreme Court U. S. Filed Apr. 19, 1895. James H. McKenney, clerk.

Office Supreme Court, U. S.
FILED.
MAR 29 1895
JAMES H. McKENNEY,
CLERK.

UNITED STATES SUPREME COURT.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY (LIMITED),

Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Petition of Respondent for Writ of Certiorari.

BUTLER, STILLMAN & HUBBARD,

Proctors for Petitioner.

United States Circuit Court of Appeals

SECOND JUDICIAL CIRCUIT.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY, LIMITED,

Libellants,

AGAINST

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Notice is hereby given that upon the petition of the Compania de Navigacion La Flecha, verified the 26th day of March, 1895, and upon all the pleadings and proceedings herein, we shall, on Monday, the 1st day of April, 1895, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington.

New York, March 26th, 1895.

BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent.

TO MACFARLAND & PARKIN,
Proctors for Libellants.

SUPREME COURT OF THE UNITED STATES.

WILLIAM W. BRAUER and FREDERICK C. BRAUER and the RELIANCE MARINE INSURANCE COMPANY, LIMITED,

Libellants,

AGAINST

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

And now comes Compania de Navigacion la Flecha by Wilhelmus Mynderse, its advocate, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all of the proceedings by them had in the suit now or lately before them, wherein William W. Brauer, Frederick C. Brauer and the Reliance Marine Insurance Company, Limited, were libellants, and Compania de Navigacion la Flecha was respondent.

WILHELMUS MYNDERSE,
Advocate for Petitioner.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Compania de Navigation la Flecha, for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring before the Supreme Court a certain case wherein William W. Brauer, Frederick C. Brauer and the Reliance Marine Insurance Company, Limited, are libellants against the Compania de Navigacion la Flecha, respectfully shows:

FIRST. At all the times hereinafter mentioned, the libellants William W. Brauer and Frederick C. Brauer were copartners doing

business under the firm name of William W. Brauer & Co., and the Reliance Marine Insurance Company, Limited, was a corporation organized under the laws of Great Britain.

SECOND. At all the said times the Compania de Navigacion la Flecha was a corporation organized and existing under the laws of the Kingdom of Spain, and owner of the ocean steamer "Hugo."

THIRD. On or about the 10th day of October, 1891, the petitioner, acting by its agent, entered into a contract with the firm of William W. Brauer & Co., for the transportation of about 160 live cattle on the upper deck of the steamer "Hugo" intended to sail from New York about October 24th, 1891, for Liverpool, England. By the terms of the contract it was provided that the shippers should assume all risk of mortality or accident, however caused, throughout the voyage, and that the regular line form of live stock bill of lading should be used for the cattle shipped under the contract, and that its conditions should govern any questions not provided for in the contract.

FOURTH. Thereafter and on the 24th day of October, 1891, the said William W. Brauer & Co. shipped on the "Hugo" 165 live cattle on deck, and a bill of lading was issued therefor by the steamer in which it was provided, among other things, that the animals were on deck at owner's risk, and further that the steamer should not be held accountable for accident to or mortality of the animals from whatever cause arising, and further that the carrier should not be liable for loss or damage occasioned by causes beyond its control by perils of the sea or other waters, by collisions, stranding or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the master, pilot, mariners or other servants of the shipowner, not resulting from want of due diligence by the owners of the ship; and further that the contract should be governed by British law, with reference to which law the contract was stated to be and was in fact made; and, finally, that in respect to the bill of lading the shipper, owner, consignee or holder thereof agreed to be bound by all of its terms and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

FIFTH. On the said 24th day of October, 1891, the said steamer set sail from New York bound to Liverpool, England.

The "Hugo" was an iron steamer of the highest class, and in good condition. Her length was 375 feet, and her beam 36 feet, and her depth of hold about thirty feet. Under the contract the stalls for the cattle were to be erected by the ship to the satisfaction of the shipper, who assumed all responsibility for the same. They were of the usual style, were properly constructed and in every way sufficient. The cattle were in charge of two drovers with four assistants, all in the employ of the shippers.

SIXTH. On the 30th of October the steamer met a storm which continued until November 2d. During the continuance of the storm the steamer lay hove to for thirty-six hours. When the storm was over 126 cattle had been lost. One beast died subsequently, and the remaining thirty-eight were delivered by the steamer at Liverpool about November 7th.

SEVENTH. The firm of William W. Brauer & Co. had taken insurance upon the cattle from the Reliance Marine Insurance Company against perils of the sea, jettisons, barratry of the master and mariners, and all other perils, losses and misfortunes that might come to the hurt, detriment or damage of said cattle, to the extent of $75 per head, the said cattle being valued in said policy at the sum of $100 per head, and on November 30th, 1891, the said insurance company paid to William W. Brauer & Co. insurance on the said 126 head of cattle so lost at sea

EIGHTH. On the 25th day of March, 1892, the members of the firm of William W. Brauer & Co. and the Reliance Marine Insurance Company united in a libel filed in the District Court of the United States for the Southern District of New York against the Compania de Navigacion la Flecha, claiming damages in respect to the loss of said cattle upon allegations that the "Hugo" having encountered some rough weather, her master and crew became panic stricken and drove overboard 126 head of cattle. The libel alleged that the vessel did not incur any extraordinary or unusual stress of weather, and that the act of said master and crew in driving overboard said cattle was wholly unnecessary, and that the loss of the cattle was due to the incompetency and lack of skill of the master and crew. Damages were claimed in the amount of $12,600.

NINTH. On the 8th day of July, 1892, the Compania de Navigacion la Flecha filed its answer to the libel, in which, among other things, it averred that by the terms of the contract of shipment it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond its control, by the perils of the seas or other waters, or by other accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, mariners or other servants of the ship owner, and that the cattle were carried on deck at the owners' risk and under a special provision that the steamer should not be accountable for accident to or mortality of the animals from whatever cause arising, and that the contract should be construed and governed by the law as administered in the Courts of Great Britain. The answer further averred that the loss of the cattle was due to perils of the sea encountered upon the voyage, which broke certain of the cattle houses and set the cattle adrift, and that during the continuance of the perils and by reason thereof, certain of the cattle were washed overboard and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or helpless condition, and that upon such being taken to the gangways they were washed overboard by the seas, which were at the time so raging that one of the seamen of the steamer was washed from the deck into the sea. The answer further averred that the care given to the cattle was according to the best judgment of the master of the steamer, and that if he erred in his judgment or was in any degree negligent, which was denied, the ship owner was absolved from liability and responsibility by reason of the terms of the bill of lading, and that by the law as administered in Great Britain, the ship owner being without fault, was validly, under the terms of the contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of its master, mariners or other servants.

TENTH. The case came on for trial in the District Court in January, 1893. Upon the trial, proofs were presented by the libellants in an attempt to show that the master was negligent in the navigation of his vessel, and that the loss of the cattle was due to that cause. They also presented proofs to show that the cattle had been driven overboard under the orders of the master of the steamer. The respondent presented proofs to sustain the allega-

tions of its answer. The log of the steamer showed that in the afternoon of October 30th, a heavy sea destroyed some of the cattle hatches on the port side, opposite hatches four and three, and continued:

"We immediately fixed up in the best manner that it was "possible the houses and the oxen; the boards that were lying "loose on the deck we threw overboard. Nightfall, the weather "slightly clear towards the horizon, with signs of heavy rain clouds; "wind fresh from the northwest, seas very lively from the same di- "rection and from the west, coming on board with less force than "during the afternoon, and in this way we passed the night. At "daylight, wind very fresh from the north, with seas from the same "direction and from the northwest.

"On the twentieth hour we stopped the engine in order "to arrange the houses that had been broken during the "night opposite No. 4, and replaced the oxen that were outside of "their houses. At nine o'clock they were all back in their places "with the exception of one which remained on hatch No. 5, and "which, notwithstanding all our endeavors to get him to rise, it has "been impossible to succeed, he remaining on the same hatch No. "5. Subsequently, and while the engine was still stopped, we gave "food and drink to all the oxen. On the twenty-second hour after "all was arranged, we again started under full steam and continued "to sail in the direction of our course, and without further mishaps "we arrived at the middle of the day.

"October 31st (12 o'clock noon). Commencing this day with "very strong wind from the north-northeast with very lively seas "from the same direction and from the northwest, which came on "board from all over, flooding the houses and bridges always full "of water and governing our course as noted in the table. In the "second hour weather very hard from the north-northeast, the "heavens and the horizon closed and with rain accompanied by "very heavy seas with full crest, also from the northwest, which strike "against the sides of the vessel, coming on board and making the "vessel labor terribly. At this hour some of the houses opposite "No. 4 were destroyed; several of the oxen being loose, we stopped "the engine and remained cross-wise to wind and seas; seeing that "the weather was becoming worse at every moment and that the "barometer continued to fall rapidly (at this time, 29.55), we "determined to open gangway No. 4 in order that the oxen which "were loose could go over, which was done with much precaution "to avoid personal mishaps. Once that it was opened, the oxen "that were loose were carried over with the heavy rolling of the "vessel. These were about ten, with the one mentioned on the "previous day which was almost dead and which we threw over "with ropes. Towards nightfall, weather quite a hurricane, the "machinery stopped, and lying crosswise to the wind and waves, the "vessel rolling and making all suffer very much. At twelve hours

" we set the mainsail with the object of steadying the vessel. The " greater part of the oxen are down and many are carried from port " to starboard with the boards from the houses, loose on account of " the heavy rolling of the vessel and with a thick and heavy sea that " comes on board on both sides. In this way, and with the weather " declared into a hurricane, we passed the night.

" At daylight, hurricane. All the deck is in a lamentable state ; " the cattle from port to starboard and from starboard to port, some " with their legs broken, others dead with so much suffering, others " with their legs tangled in the rail ; and some, during the " night by the blows of the seas and the rolling of the ship, " had gone out through the gangway to the water. On the nine- " teenth hour (7 A. M. Sunday) we decided to open gangway " No. 3, which was done with much precaution, as it was im- " possible to go on deck on account of the rollings, and the seas " that continually came in, and we immediately commenced the sad " operation of throwing over all the cattle that were loose on the " decks and in sorry plight, some with ropes and others dragging " them to the gangway and from here the seas that were boarding " us would carry them over. We have noticed the absence of some " of the hatch wedges, very likely knocked out by the cattle during " the night, and have immediately replaced them with new ones. " The hurricane continues with great force and fury, the barometer " 29.21. Notwithstanding our precautions to avoid personal mis- " haps, at 10:30 in the morning, more or less, a sea carried out " through gangway No. 3 one of the boys named Enchortiata. He " was carried over. We noted his absense and immediately, as he had " not become separated from the side of the vessel, we threw him a " life preserver and with the aid of a thin rope we were able to save " him. On coming on deck we noticed he was bleeding from one " ear, no doubt having received a blow on that part. We put him " to bed.

" On the twenty-third hour, the wind carried away the mainsail, " leaving nothing but the bolt ropes of the same. At noontime the " stern was clear, there being no more cattle. There are only some " remains of the houses. Towards the bow the gangway No. 34 is " clear, as is also the hatchway. There remain on board only " thirty-nine oxen and those up by the bow forward of No. 3, " which are the ones that suffered less from the effects of the hur- " ricane.

* * * * * * *

" November 1st (12 o'clock noon). We commenced this day " with the engines stopped and the rigging taut, with hurricane, the " vessel crosswise to wind and seas. Towards afternoon the wind " slackened somewhat in force, but the high and crested seas con- " tinued the same, striking the vessel as in the previous day and " with much rolling. On the fourth hour we put up the staysail to " steady the rolling of the ship. Night came on with the wind very

" hard from the north, accompanied by terrible seas with heavy " crests, which strike against the hull making the vessel shiver. At " eight o'clock the wind commenced to decrease and the seas gradu- " ally to go down."

By stipulation it was provided that the English judicial decisions, as contained in the printed reports of the Law or Admiralty Courts, be referred to as evidence of the English common or maritime law as administered in the English courts *(fol. 678)*, and refereuce was made by the petitioner to the cases of the *Duero, 2 Ad. & Ecc., 393; Grill vs. The General Iron Screw Collier Co., L. R., 1 C. P., 600; The Cressington, L. R., 1 Prob., 152; Burton vs. English, L. R., 12 Q. B. Div., 218.*

ELEVENTH. On the 8th day of July, 1893, the learned District Judge filed his opinion, in which he held that, by the perils encountered, some of the cattle were fatally wounded or maimed, but that others were cast overboard, or negligently suffered to go overboard, without any effort being made to separate the sound from the maimed *(Opinion, fol. 803)*, and he, therefore, held that the libellants were entitled to a decree for such of the oxen voluntarily sacrificed as were either in sound condition or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous. He further held that the exemptions of the bill of lading, which provided that the cattle should be at owners' risk, and that the steamer should not be held accountable for accident to or mortality of the animals, or for any accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, were invalid as against the public policy of this country, and that the further stipulation substituting the British law for the law of the United States was likewise invalid *(Opinion, fols. 806, 807)*; and reference was made to a Commissioner to assess damages accordingly.

TWELFTH. The Commissioner reported:

" I am satisfied that much the greater portion of the 126 cattle " were set loose by the storm and thrown down and rolled about " the deck during Saturday night and Sunday, and that at least half " of all that were lost were either dead or fatally wounded or maimed " and in a hopeless condition when they were carried overboard."

* * * "My conclusion from the whole evidence is in favor of the "probability that the proportions between the dead and the fatally "wounded on the one hand, and those that were alive and not "fatally maimed or wounded on the other, are about equal" (*Report, fols. 936, 937*), and he accordingly reported against the respondent for the loss of 63 cattle.

THIRTEENTH. The District Court modified the report of the Commissioner in the matter of certain attendant expenses, but confirmed his allowance of damages in respect to the number of cattle, and entered a decree against the respondent for $7,104.32.

FOURTEENTH. Appeal was taken by both parties from this decree to the United States Circuit Court of Appeals for the Second Judicial Circuit, where it came on for argument in December, 1894. The same authorities cited by the petitioner in the District Court were presented upon such argument.

A decision was filed March 5, 1894, a majority of the Court holding that the decree of the District Court should be affirmed, stating:

"The reason for throwing both sound and maimed cattle over-"board was a great dissatisfaction with the existing state of the "decks, an apprehension that the state of things would continue, "and a determination to put an end to trouble from cattle."

The opinion recites the provision that the cattle were shipped "on deck at owner's risk," but gives no consideration whatever to that provision or to the case cited to show the construction given by the English courts to such provision.

In considering the provision "Steamer not to be held accountable "for accident to or mortality of the animals from whatsoever cause "arising," the majority of the Court held that the loss of the 63 cattle was not an accident, nor was the destruction to be regarded as mortality.

In considering the clause which provided that the shipowner should not be responsible for damages occasioned by causes beyond his control, by the perils of the sea, by accident of navigation of whatsoever kind, even when occasioned by the negligence or default of the master, mariner, pilot or other servants, the majority of the Court held, without consideration of the provision, that the shipowner should not be liable for loss "occasioned by causes beyond his control;" that the acts of the master and crew in regard to the 63 cattle were not occasioned by an accident of navigation, caused by negligence or error of judg-

ment, but that it was an entire clearance of the decks without apparent necessity, and without an effort to discriminate or save any, and that the act of the master was not the result of an opinion that the drowning of the sound cattle was called for by prudential considerations for the ultimate safety of the lives or the property in his charge. The majority further held that only the injury to, and the drowning of, the maimed animals were caused by perils of the sea, and that the non-delivery of the sound cattle was not caused by a peril of the sea, or by accidents to navigation, or by circumstances properly incident to navigation.

The majority of the Court further held that the master's unfounded but existing apprehension in regard to the future relieved his conduct from the charge of barratry.

The majority of the Court held :

"The respondent offered proof of the British law, as announced "by English decisions, which permits the ship owner to relieve him- "self, by express contract, from the consequences of the negligence "of his captain or crew, but no decision touches with any closeness "the state of facts which are disclosed in this record, and we are "left to decide, without the aid of English authorities, the question "whether the acts of the master which caused the non-delivery of "sixty-three cattle were within the clauses in the bill of lading which "freed the ship owner from liability."

The Court did not in its opinion refer to any English authorities as being authorities examined by them.

Judge WALLACE dissented from the opinion held by the majority of the Court and said :

"I agree with the commissioner when he says, 'I do not doubt the "'entire good faith of the master, and that he would gladly have "'saved the other cattle, as well as the thirty-nine that remained "'on board.' The theory of the libel is that the master and crew "of the vessel became 'panic-stricken,' and drove the cattle over- "board, and the evidence more nearly supports this theory than the "one which has been adopted. I think a prudent regard for the "safety of the ship and crew, in view of the situation as it "was at the time, justified him in clearing the deck of the "mass of dead and wounded cattle, and that it is idle to "say that there was any practicable opportunity upon that "storm-swept deck to separate the dead cattle from the "wounded and dangerous live ones. After the event, and with the "wisdom which comes from retrospect, it is not difficult to conjec- "ture in case of disaster what might have been done that was not

" done, but I am satisfied from the proofs that the master did every-
" thing which a prudent and honest navigator would have done
" under the circumstances from the time he hove to his vessel until
" the hurricane was over, and that the loss of the cattle was caused
" by perils of the sea, and therefore within one of the excepted risks
" of the bill of lading."

FIFTEENTH. Since the decision of the United States Circuit Court of Appeals the petitioner has made a motion for a reargument of the cause in that Court, and his application has been denied without any opinion being filed by the Court.

SIXTEENTH. By the provisions of the English law, which were duly presented to the United States Circuit Court of Appeals, it is held that in the event of shipments being made under bills of lading which provide that they are on deck at owner's risk, the ship owner cannot be held liable for any loss arising through an unjustifiable jettison of the goods by the master, or by reason of any other negligent act of the master or crew (Burton vs. English, L. R., 12 Q. B. Div., 218), and that by other provisions of the English law, which were duly presented to the Court, it is held that the ship owner may lawfully exempt himself from liability or responsibility for damages arising through the negligence of master, pilot, officers or crew.

SEVENTEENTH. Your petitioner avers that this case is one in which it is proper for this Court to issue a writ of *certiorari* for the following reasons:

(1) Because the said cattle were lost by perils of the sea.

(2) It being admitted that one-half the cattle were maimed or killed by perils of the sea, and that it was proper for the master to clear his decks of such cattle, it should be held that the remaining cattle could not, even if living, be separated from those that were wounded or dead, and that they were lost as a necessary incident to the clearing of the decks of the wounded and dead cattle, and that they were, therefore, lost by a peril of the sea.

(3) If the sixty-three cattle, for the value of which decree has been rendered against the respondent, were sound and were driven or designedly suffered to go overboard by the master without cause, they were unjustifiably jettisoned, and the shipowner is relieved from responsibility therefor by the terms of the bill of lading, which provided that the cattle were shipped on deck at owner's risk, according to the construction placed upon that clause by the Courts of Great Britain.

(4) If the sixty-three cattle, for the value of which decree has been rendered against the respondent, were sound and were driven or designedly suffered to go overboard by the master without cause, the loss or damage was occasioned by causes beyond the control of the shipowner, he having properly fitted, manned and equipped his vessel and confided the same to the care of a qualified master.

(5) If the sixty-three cattle, for the value of which decree has been rendered against the respondent, were sound and were driven or designedly suffered to go overboard by the master without cause, and were drowned, the loss was occasioned by a peril of the sea or accident of navigation occasioned by the negligence, default or error in judgment of the master, and under the provisions of the bill of lading and the British law applicable thereto, the shipowner is freed from responsibility.

(6) That although the District Court specifically held that the stipulation that the contract should be governed by British law was invalid and void, the Circuit Court of Appeals omitted to pass upon that point, and that the point is one of great public interest.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring this case before this Honorable Court and for such other relief as to this Honorable Court may seem just.

Compania de Navigacion la Flecha
H. Maitland Kersey
Agent.

SOUTHERN DISTRICT OF NEW YORK, ss. :

H. MAITLAND KERSEY, being duly sworn, says that he is agent in New York of the Compania de Navigacion la Flecha, owner of the steamer "Hugo," and is authorized to make this verification on its behalf. That he has read the foregoing petition and knows the contents thereof, and that the allegations contained therein are true according to deponent's information and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings, and in the Record of the cause in the District Court and in the United States Circuit Court of Appeals.

Deponent further says that the Compania de Navigacion la Flecha is a foreign corporation and none of its officers reside within the United States, but on the contrary reside abroad, where they now are, as deponent believes.

H. MAITLAND KERSEY.

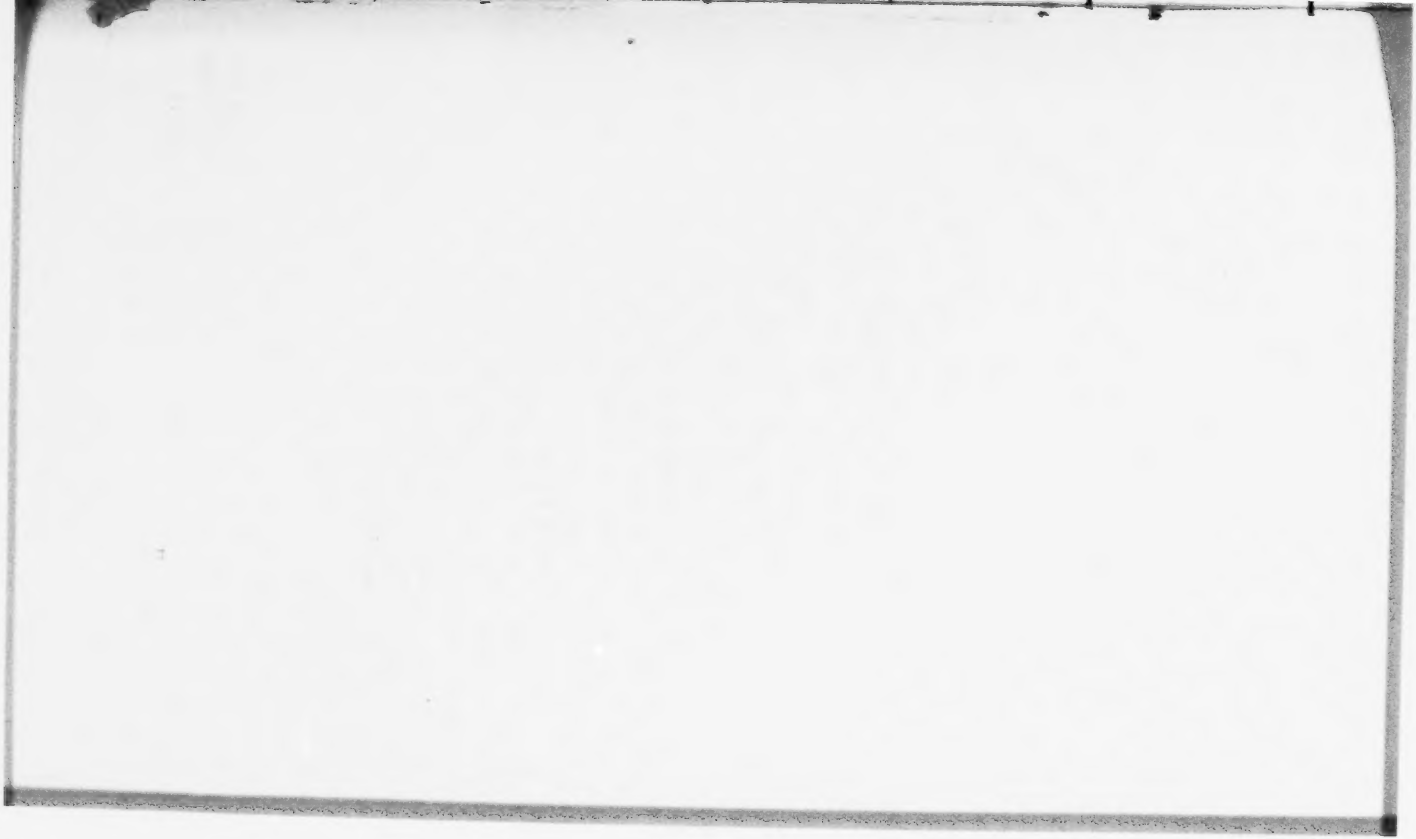
Sworn to before me, this 26th day of March, 1895.

CHARLES C. NOTT, JR.,
Notary Public,
N. Y. Co.

[L. S.]

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded and that the same is one in which the prayer of the petitioner should be granted.

WILHELMUS MYNDERSE.



No. 39.

Brief of Mynderse for Appell

Filed April 1, 1896.

No. 39.

Office Supreme Court, U. S.
APR 1 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY (LIMITED),

Libellants,

against

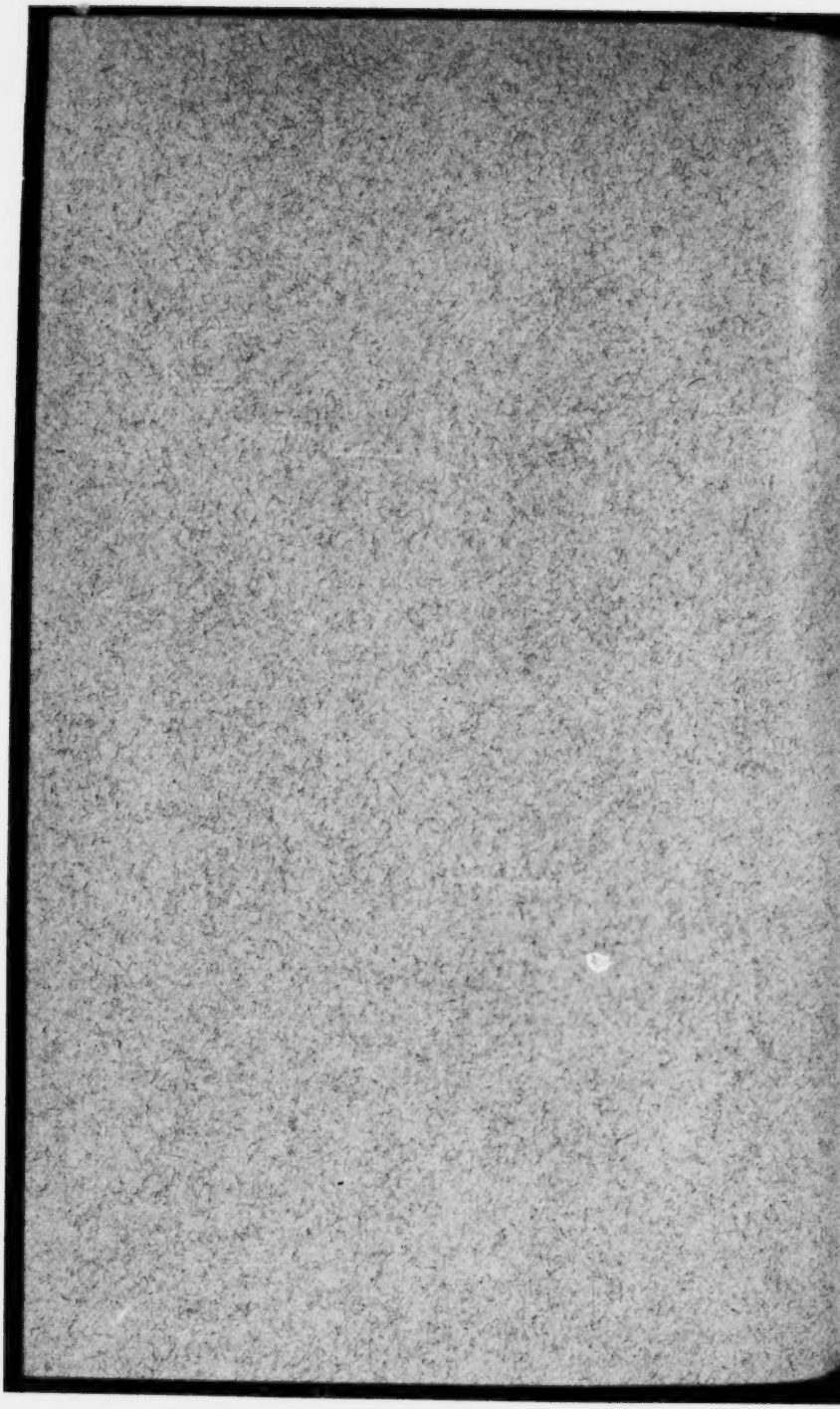
COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Brief in Support of Respondent's Petition for Writ of Certiorari.

BUTLER, STILLMAN & HUBBARD,

Proctors for Petitioner.



Supreme Court of the United States

WILLIAM W. BRAUER, FREDERICK C. BRAUER AND THE RELIANCE MARINE INSURANCE COMPANY, LIMITED,

Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA,

Respondent.

Brief in Support of the Petition of Respondent for a Writ of Certiorari.

This action was originally instituted in the District Court of the United States for the Southern District of New York, by the libellants, as owners and insurers of a shipment of cattle, to recover from the respondent the alleged value of 126 head of cattle lost upon a voyage of the steamer *Hugo* from New York to Liverpool in November, 1891.

In October, 1891, the libellants, William W. Brauer and Frederick C. Brauer, composing the firm of W. W. Brauer & Company, shipped on board the respondent's steamer *Hugo*, at New York, 165 head of cattle, to be delivered at Liverpool.

The shipment had been provided for in a contract made between the agent of the *Hugo* and the libellants, W. W. Brauer & Company, October 10, 1891.

By the terms of this contract, the respondent let to the shippers

" space for the transportation of live cattle on the steamer *Hugo*,
" intended to sail from New York about October 24, 1891, for Liver-
" pool, England, for about 160 live cattle on the upper deck * * *
" at the rate of fifty shillings British sterling for each animal shipped
" on open decks " *(Exh. 2, Record, fols. 690 ,691).*

The shipper agreed to prepay freight on the number of cattle shipped at New York,

" vessel lost or not lost, and irrespective of the number landed at " the port of destination, and the shipper assumed all risk of mor- " tality or accident, however caused, throughout the voyage " *(Exh. 2, Record, fol. 691).*

Stalls were to be erected at the steamer's expense, and the steamer undertook to supply water for the use of the animals, space for their fodder, suitable gangways for loading the cattle, and free passage over and back to the drovers in charge of the animals *(Exh. 2, Record, fols. 692, 693).*

It was further provided in the agreement ;

" The line form of live stock bill of lading to be used for cattle " to be shipped under this contract, and its conditions to govern any " questions not provided herein, subject to United States Govern- " ment inspection " *(Exh. 2, Record, fol. 696).*

Under this agreement the libellants W. W. Brauer & Company shipped on board the *Hugo* at New York, October 24, 1891, 165 head of cattle, and, in accordance with the terms of the agreement, received a bill of lading, the material portions of which were as follows:

" Received in apparent good order and condition by the Spanish " steamer *Hugo*, from Wm. W. Brauer & Co , to be transported by " the good ship *Hugo*, now lying in the port of New York, and " bound for Liverpool, one hundred and sixty-five live cattle on deck.

" On deck at owners' risk ; steamer not to be held accountable " for accident to or mortality of the animals from whatever cause " arising. * * *

" It is mutually agreed that the carrier shall not be liable for " loss or damage occasioned by causes beyond his control, by the " perils of the sea, or other waters ; * * * by barratry of " the master or crew ; * * * by collisions, stranding or " other accidents of navigation of whatsoever kind (even when " occasioned by the negligence, default or error in judgment of " the pilot, master, mariners or other servants of the ship owner, " not resulting, however, in any case, from want of due diligence by " the owners of the ship, or any of them, or by the ship's husband or " manager). * * *

" Also that, in the event of claims for short delivery when the " ship reaches her destination, the price shall be the market price " at the port of destination on the day of the ship's entry at the " Custom House, less all charges saved. * * *

"Also that this contract shall be governed by British law, with "reference to which law this contract is made.

"And, finally, in accepting this bill of lading, the shipper, owner "and consignee of the goods, and the holder of the bill of lading, "agree to be bound by all of its stipulations, exceptions and condi- "tions, whether written or printed, as fully as if they were all signed "by such shipper, owner, consignee or holder."

Exh. A, Record, fols. 709-716.

The libel was based upon the bill of lading *(Libel, Record, fol. 7)*, and upon an allegation that

"On or about October 31, 1891, the said vessel, having en- "countered some rough weather, the master and crew of said vessel "became panic-stricken and drove overboard 126 head of cattle. "The said vessel did not incur any extraordinary or unusual stress "of weather, and the act of said master and crew in driving over- "board said cattle was wholly unnecessary, and the loss of said "cattle is due to the incompetency and lack of skill of the master "and crew" *(Libel, Record, fol. 8)*.

The libel further alleged that the libellants, the Reliance Marine Insurance Company, Limited, of Liverpool, had made insurance upon the cattle for W. W. Brauer & Co. against perils of the sea, jettisons, barratry of the master and mariners, and had paid the insurance on the 126 head of cattle lost *(Libel, Record, fols. 10, 11)*.

The answer filed by the respondent denied the allegations of the libel respecting the circumstances under which the cattle were lost, and averred that

"The loss of said cattle was due to the perils of the seas encoun- "tered upon the said voyage, which broke several of the cattle "houses and set the cattle adrift, and that during the continuance "of the perils, and by reason thereof, certain of the cattle were "washed overboard and others were thrown about the deck, bruised "and with broken limbs, and reduced to a dead, dying or hopeless "condition, and that upon such being taken to the gangways they "were washed over by the seas, which were at the time so raging "that one of the seamen of the steamer was washed from the deck "into the sea" *(Answer, Record, fol. 26)*.

The answer further averred that:

"The care given to said cattle was according to the best judg- "ment of the master of said steamer, and that if he erred in his "judgment or was in any degree negligent, which the respondent "denies, that still this respondent is absolved from accountability "and responsibility by reason of the terms of the bill of lading;

" and, also, that by the law as administered in the Courts of Great " Britain, the respondent, being itself without fault, is validly, under " the terms of the said contract and bill of lading, absolved from all " responsibility for any negligent or improper act or conduct on the " part of the master, mariners or other servants of the respondent " *(Answer, Record, fols. 27, 28).*

The answer specifically claimed the benefits of the exemptions of the bill of lading, and the benefits of the British law by an averment of the provision :

" That the contract should be construed and governed by the " law as administered in the Courts of Great Britain, with reference " to which law the contract was stated to be made and was made " *(Answer, Record, fol. 25).*

The *Hugo* was an iron steamer, of highest class, and in good condition. Her length was 375 feet; her beam, 36 feet, and her depth of hold about 30 feet. She was under the command of an experienced master.

On the 30th of October the vessel met a storm, which continued until November 2d. During the continuance of the storm the steamer lay hove-to for thirty-six hours. When the storm was over 126 cattle had been lost.

The proofs upon the trial were in serious conflict. The libellants presented proofs to show that the master was negligent in the navigation of his vessel, and that the loss of the cattle was due to that cause. They also presented proofs to show that the cattle had been driven overboard under the orders of the master of the steamer.

The respondent presented proofs to sustain the allegations of its answer.

The log of the steamer showed that in the afternoon of October 30th a heavy storm was encountered, as a result of which 126 of the beasts perished, being killed or fatally maimed by the perils encountered, or swept overboard by the seas when the gangways were opened to clear the decks of the dead cattle. The log is printed at folios 717–730 of the record.

It was provided by stipulation that the English judicial decisions, as contained in the printed reports of the Law or Admiralty Courts, might be referred to by either party as evidence of the English common or maritime law as administered in the English Courts *(Stipulation, Record, fol. 678).*

The District Court held that, by the perils encountered, some of the cattle were fatally wounded or maimed and that others were cast overboard, or negligently suffered to go overboard, without any effort being made to separate the sound from the maimed *(Opinion, Record, fol. 803)*.

Held that the exemptions of the bill of lading, which provided that the cattle should be at owners' risk, and that the steamer should not be held accountable for accident to or mortality of the animals, or for any accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, were invalid as against the public policy of this country, and that the further stipulation substituting the British law for the law of the United States was likewise invalid *(Opinion, Record, fols. 806, 807)*.

A decree was accordingly made in favor of the libellants for such of the cattle voluntarily sacrificed as were either in sound condition or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of Nobember 1st, and on the evening of the night previous *(Opinion, Record, fol. 806)*.

The Commissioner, to whom reference was had to assess damages, reported :

"I am satisfied that much the greater portion of the 126 cattle
" were set loose by the storm and thrown and rolled about the deck
" during Saturday night and Sunday, and that at least half of all
" that were lost were either dead or fatally wounded or maimed and
" in a hopeless condition when they were carried overboard. * * *
" My conclusion from the whole evidence is in favor of the probabil-
" ity that the proportions between the dead and the fatally wounded,
" on the one hand, and those that were alive and not fatally maimed
" or wounded, on the other, are about equal " *(Report, Record, fols. 936, 937)*.

and he accordingly reported against the respondent for the loss of 63 cattle.

The report of the Commissioner was confirmed by the District Court as to the number of cattle for which the steamer was held liable, and a decree was accordingly entered *(Opinion and Decree, Record, fols. 967, 971-973)*.

Both parties appealed to the United States Circuit Court of Appeals for the Second Judicial Circuit, and on March 5, 1894, a

decision was filed by a majority of the Court holding that the decree of the District Court should be affirmed.

The majority of the Court state :

"The reason for throwing both sound and maimed cattle over-
" board was a great dissatisfaction with the existing state of the
" decks, an apprehension that the state of things would continue,
" and a determination to put an end to trouble from cattle."
Opinion, Record, fol. 1033.

The majority further held in regard to the 63 cattle for which the steamer was held liable that they were lost through an entire clearance of the decks without apparent necessity and without an effort to discriminate or save any, and that there was no pretense that it was to save the ship or the cargo, or that it was necessary to sacrifice the animals for the benefit of the survivors *(Opinion, Record, fols. 1039, 1040).*

The majority of the Court also held that the English authorities cited to establish the British law did not control the case *(Opinion, Record, fols. 1039, 1044).*

Judge WALLACE dissented from the opinion held by the majority, and said :

" I agree with the Commissioner when he says ' I do not doubt
" ' the entire good faith of the master, and that he would gladly
" ' have saved the other cattle, as well as the thirty-nine that re-
" ' mained on board.' * * * I think a prudent regard for the
" safety of the ship and crew, in view of the situation as it was at
" the time, justified him in clearing the deck of the mass of dead
" and wounded cattle, and that it is idle to say that there was any
" practicable opportunity upon that storm-swept deck to separate
" the dead cattle from the wounded and dangerous live ones. After
" the event, and with the wisdom which comes from retrospect, it
" is not difficult to conjecture in case of disaster what might have
" been done that was not done ; but I am satisfied from the proofs
" that the master did everything which a prudent and honest navi-
" gator would have done under the circumstances from the time he
" hove-to his vessel until the hurricane was over, and that the loss
" of the cattle was caused by perils of the sea, and therefore within
" one of the accepted risks of the bill of lading." *(Opinion, Record, fols. 1049–1051).*

The majority further held that while the injury to and drowning of the maimed animals were caused by perils of the sea, the non-delivery of the sound cattle was not caused by perils of the sea or

by accidents of navigation, or by circumstances properly incident to navigation *(Opinion, Record, fols. 1042, 1043)*.

The Court thereupon ordered that the decree appealed from be affirmed, and that a mandate issue accordingly *(Order, Record, fols. 1055, 1056)*.

For the reasons set forth in the petition the respondent prays for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding that it certify and return to this Court all of the proceedings by them had in the action *(Petition, Art. 17, pp. 11, 12)*.

POINTS.

First.

THE LAW OF GREAT BRITAIN SHOULD BE APPLIED TO THE CONSTRUCTION OF THE CONTRACT AS SET FORTH IN THE BILL OF LADING, AND THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN OMITTING TO APPLY SUCH LAW TO THE CONSTRUCTION OF THE AGREEMENT.

In the bill of lading the following provisions are found:

"This contract shall be governed by the British law, with refer-
"ence to which law this contract is made.

"Finally, in accepting this bill of lading, the shipper, owner and
"consignee of the goods, and the owner of the bill of lading, agree
"to be bound by all its stipulations, exceptions and conditions,
"whether written or printed, as fully as if they were all signed by
"such shipper, owner, consignee or holder" *(Exhibit A, Record, fols. 713–716)*.

On October 10, 1891, two weeks before the bill of lading was issued, a contract had been made for the shipment of cattle. That contract provided that this very bill of lading should be used *(Exhibit 2, Record, fol. 696)*, and specifically provided that the shipper assumed all risk of mortality or accident, however caused, throughout the voyage *(Exhibit 2, Record, fol. 691)*.

In the very recent case of *Henderson vs. Goldsmith*, in which an

opinion was rendered by this Court at the present term, it was held that a similar preliminary contract was a mere memorandum between the parties, and that the relations of the parties were to be governed by the provisions of the bill of lading.

Goldsmith vs. Henderson, Calendar U. S. Supreme Court, 1894, No. 107.

In the case now under consideration there can be no question but that the bill of lading is the controlling contract for the reason that the preliminary contract provided in terms for this form of bill of lading, and the bill of lading was subsequently accepted by the shipper as being strictly in line with the preliminary contract. So far from being objected to or protested against in any way by the libellants, they founded their libel upon it *(Libel, Art. 1, Record, fol. 7).*

It is fair to say, therefore, that the parties deliberately chose to submit the question of responsibility under the contract to the law of Great Britain.

In the case of the *Montana* this Court held:

"The general rule that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

"There does not appear to us to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made."

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397, 458.

This Court held in that case that there was nothing to indicate that the contracting parties looked to any other law than the law of the United States.

In the case under consideration, however, it is apparent that the parties *did* look to the law of England; that they deliberately chose it; that it was not the exaction from a shipper by a carrier, but that it was in accord with a preliminary contract, freely made and unobjected to.

The cattle were destined to an English port. It was fitting that reference should be made to the law of that port. Any differences between shippers and ship-owner would naturally be submitted to the law of the place where their relations terminated.

Moreover, the Reliance Marine Insurance Company (Limited), which represents the entire interest of the libellants *(Libel, Record, fols. 5, 10, 11; Assignment Exh. 1, Record, fol. 682)*, is a British corporation having its principal office in Liverpool, the port of the *Hugo's* destination.

Proof of the English law was made under a stipulation, which provided:

"It is hereby stipulated that the English judicial decisions, as "contained in the printed reports of the Law or Admiralty Courts, "may be referred to by either party as evidence of the English "common or maritime law as administered in the English Courts" *(Stipulation, Record, fol. 678)*.

The following cases were cited by the petitioner in the District Court and in the United States Circuit Court of Appeals:

The Duero, L. R., 2 Ad. & Ecc., 393 (1869).
Grill vs. General Iron & Screw Collier Co., L. R., 1 C. P., 600 (1866).
The Cressington, L. R., 1 Prob., 152 (1891).
Burton vs. English, L. R., 12 Q. B. Div., 218 (1883) (Record, fol. 247).

The application of these cases respectively to the several exemption clauses of the bill of lading will be hereafter considered.

The District Judge declined to enforce the English law, upon the ground that the stipulation in the bill of lading providing for the application of the British law was invalid as against the public policy of the United States *(Record, Opinion, fol. 806)*.

A similar provision had, however, been sustained in the District Court of Maryland.

The Oranmore, 24 Fed. Rep., 922.

The United States Circuit Court of Appeals avoided any discussion of the application of the British law, disregarding certain of the exemption clauses, and holding in respect to others that the facts did not render the question of applying the British law material *(Opinion, Record, fols. 1038, 1039, 1044)*.

The case of *Oscanyan vs. Arms Co., 103 U. S., 261,* which has been cited in opposition, is not pertinent, for the reason that the suit was founded on a *turpis causa*, arising and performed wholly within the United States; nor is the case of *Rousillon vs. Rousillon, L. R. 14, Chan. Div., 351,* for the reason that the contract there sued upon was in fact enforced, though Justice FRY did say *obiter* that, if a contract valid in France was made in France *to be performed in England*, the English courts would not enforce it if it was against the morals or public policy of England *(pp. 357, 369)*.

Second.

THE PROVISIONS IN THE BILL OF LADING THAT THE CONTRACT BE GOVERNED BY BRITISH LAW, IS NOT INVALID.

It cannot be fairly said that there is a question in the case whether or not it is against the public policy of this country to permit a carrier by sea to exempt himself from the consequences of his servants' negligence or error. The real question is whether it is against the public policy of this country to permit ship owner and shipper to agree in New York that their contract for a shipment of cattle from New York to England shall be construed according to the place where the final performance of the contract takes place and where, if anywhere, differences as to the performance by the carrier of his engagements would naturally arise.

It is especially proper that, where a contract relates to transportation on the high seas from one nation to another, the entire transaction not being under the jurisdiction of any one nation, the parties shall declare in their contract the jurisdiction by the laws of which they intend their contract to be governed.

With such declaration made, it is against public policy and against commercial integrity to permit either party, and especially the party with whom the right to select the forum rests, to insist that the law of the forum, and not the law stipulated in the contract, should be applied to the construction of the contract.

It has been said by this Court that it is against public policy to

permit a carrier to exempt himself from the consequences of the negligence of his servants.

Railroad Company vs. Lockwood, 17 Wallace (U. S.), 357, 368.

The rule has been extended from the strict obligations resting upon a carrier by land, to cover those of a carrier by sea.

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397.

At the time this latter decision was made there was no legislative distinction between the obligations and rights of a carrier by sea and of a carrier by land.

Nor, indeed, was there any such distinction at the time these cattle were shipped upon the *Hugo*. But Congress, with whom certainly rests the right to declare the public policy of a country, have since that date passed an act which provides in terms that:

" If the owner of any vessel transporting merchandise or prop-
" erty to or from any port in the United States of America, shall
" exercise due diligence to make the said vessel in all respects sea-
" worthy and properly manned, equipped and supplied, neither the
" vessel, or owner, or owner's agent or charterers, shall become or
" be held responsible for damage or loss resulting from faults or
" errors of navigation, or in the management of said vessel " *(Sec. 3, Ch. 105, Laws of 1893).*

The act contains another significant feature.

By Section 1 of the act it is provided that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the vessel did exercise due diligence to properly equip the vessel, and to make her seaworthy, and whereby the obligations of the master, officers or servants to carefully handle and stow the cargo, and to care for and deliver it, shall in anywise be lessened, weakened or avoided.

Section VII., however, specifically provides that the provisions of Section I. shall not apply to the transportation of live animals.

This indicates, not only a recognition by Congress, that the carrier by sea shall not be held to the strict accountability of a carrier by land, but, further, that the carrier of live animals by sea should be permitted, in distinction from carriers of other merchandise, to insert provisions in the bill of lading specifically exempting him from responsibility for the acts of master, officers or servants.

Third.

IF THE CONTRACT OF SHIPMENT IS GOVERNED BY THE BRITISH LAW, NO LIABILITY RESTS UPON THE SHIPOWNER FOR THE LOSS OF LIBELLANTS' CATTLE, EVEN UPON THE FACTS FOUND BY A MAJORITY OF THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

A majority of the Judges of the United States Circuit Court of Appeals found, as facts, that :

" The injury to and drowning of the maimed animals were caused " by the perils of the sea, but that the non-delivery of the sound " cattle was not caused by a peril of the sea or the accidents of nav- " igation or circumstances properly incident to navigation " *(Opinion, Record, fols. 1042, 1043).*

The majority further held, as a matter " undoubtedly true," that the fatally-injured cattle were " properly thrown overboard " *(Opinion, Record, fol. 1035).*

The majority further held that it was apparent

" that the master determined to rid the ship of every head of cattle " except those under the turtleback. He intended to clear the decks " of cattle whether well or injured, and no effort was made ' to sepa- " ' rate the sound from the maimed.' The cattle not injured were " pushed or prodded and driven across the slippery iron deck, and " were hurried over the gangways as rapidly as possible, and in a " short space of time. ' No attempt was made to discriminate or to " ' save any,' because the master and the crew wanted none saved. " We concur with the District Judge in the conclusion that there " was ' no reasonable or apparent necessity ' for the non-existence " of an attempt to separate the two classes " *(Opinion, Record, fols. 1031, 1032).*

The majority further held that :

" The sacrifice was not to save the vessel or her cargo, but the " presence of the cattle during the storm was a great inconvenience, " and there was, as found by the District Judge, an apprehension " that the storm would continue, and that the existing inconvenience " would be increased. The reason for throwing both sound and " maimed cattle overboard was a great dissatisfaction with the " existing state of the decks, an apprehension that the same state of " things would continue, and a determination to put an end to " trouble from cattle " *(Opinion, Record, fols. 1032, 1033).*

The finding of the Commissioner that the cattlemen showed no disposition to try to save any of the cattle, or to seek to have them saved *(Opinion, Record, fols. 895, 896)*, is not referred to by the majority of the Court, nor is there any reference to the argument of the respondent that the loss of those cattle that were not fatally wounded was a necessary incident to clearing the deck of the wrecked and maimed cattle, and ought not to be ascribed to either negligence or design on the part of the master *(Record, fol. 907)*.

Taking the facts just as they are stated by the majority of the Court, the worst case that is established is one of unjustifiable jettison by the master, either through panic or unfounded apprehension.

There are several exemption clauses to be considered.

A It was recited in the bill of lading that the cattle were shipped " on deck at owners' risk " *Exhibit A Record, fols. 709-712.)*

That such a provision should be made respecting a shipment of live animals to be transported on the deck of a freight steamer across the Atlantic, at a tempestuous season of the year, was eminently proper, and due compensation for the risks assumed by the owner of the cattle was undoubtedly given in the rate of freight at which the cattle were accepted for carriage.

In the case of *Burton vs. English*, a similar clause " The steamer " shall be provided with a deck cargo, if required at full freight, but " at merchant's risk " was considered by the Judges of the Queen's Bench Division, who substantially held that it relieved the ship owner from all responsibility for the acts of his servants, except responsibility to contribute in general average in case of lawful jettison or other lawful sacrifice.

Justice BRETT said :

" It is obvious that this is a stipulation in favor of the shipown-
" ers, for, in order to earn a larger freight, they may require part of
" the cargo to be deck cargo, and then it is to be at the merchant's
" risk. My brother CAVE, who delivered the judgment of the
" Divisional Court, held that this stipulation absolved the shipown-
" ers from liability to contribute to general average. It must be
" admitted that if there were an *improper jettison* by the master and
" crew, this stipulation would relieve the shipowners from liability.
" * * * If the liability is in consequence of any act of any of his
" servants for which the shipowner would be liable but for this
" stipulation, then it follows that the defendants are freed from

" liability. I should say that this stipulation would cover any act " of the master or crew, which being done by them as servants of " the shipowner would otherwise make him liable; *it therefore covers* " *the case of improper jettison, also a loss caused by a collision or* " *stranding owing to the negligence of the master or crew.*"

Burton vs. English, L. R., 12 Q. B. Div., pp. 218, 219, 220.

Justice BOWEN said, respecting the clause:

" Now, that clearly is a stipulation in favor of the shipowners, " and *prima facie* it seems to me meant to relieve them from the " responsibility of some act of their servants by which they would " otherwise be bound, and from the incidents of some risk which " otherwise would fall upon them as carriers and under their con- " tract of carriage. *It would, I think, clearly cover im-* " *proper jettison, also it would cover negligence of the cap-* " *tain or crew, occasioning stranding or colliison, and any* " *other acts, if any there be, of the servants of the shipowners for* " *which they would otherwise be responsible.*"

Burton vs. English, L. R., 12 Q. B. Div. 218, 223.

Justice BAGGALLAY concurred in the view of Justices BRETT and BOWEN.

See, also,

Lewis vs. The Great Western Ry. Co., L. R., 32, B. Div., 195.

McCauley vs. Furness Ry. Co., L. R., 82, B. 57.

If sixty-three sound cattle went overboard from the *Hugo*, and their loss is to be attributed to unjustifiable or improper jettison, then, under a proper application of the clause "on deck at owner's risk," as construed under the British law, the shipowner is exempt from liability.

The clause referred to was not considered at all by the Judges of the United States Circuit Court of Appeals.

If the libellants have any claim for contribution in general average because of the jettison of their cattle, that claim will have to be presented in another tribunal and be adjudged upon its merits. They cannot recover upon a charge of negligence.

B. A further clause of exemption is contained in the words:

" Steamer not to be held accountable for accident to or mortality " of the animals, from whatever cause arising" *(Exhibit A, fols. 709-712).*

The only question under this exemption, is whether the loss of the cattle was either an "accident" or "mortality" If it was, the clause gives valid exemption to the ship owner.

We submit that inasmuch as much the greater portion of the animals lost were wrecked and maimed by perils of the seas, and as the gangways were properly opened to permit the dead and wounded beasts to be swept into the sea, the loss of the others, even if sound, was a necessary incident to clearing the deck, and is in that sense to be deemed "accidental."

C. A further exemption is found in the words:

"It is also mutually agreed that the carrier shall not be liable "for loss or damage occasioned by causes beyond his control, by the "perils of the sea, or other waters * * * by barratry of the "master or crew * * * by collisions, stranding, or other acci- "dents of navigation, of whatsoever kind (even when occasioned by "the negligence, default or error in judgment of the pilot, master, "mariners or other servants of the ship owner"), etc., etc. *(Exhibit A, Record, fols. 709-712).*

(**a**) No consideration was given by the Judges of the United States Circuit Court of Appeals to the exemption for loss or damage "occasioned by causes beyond his (the shipowner's) control."

The shipowner provided a seaworthy vessel and manned her with a sufficient crew, and placed her under the command of an experienced master, so that, when she started upon her voyage, she was in every way fitted therefor.

That the master should become unreasonably panicstricken, if such was the fact, or that he should, in spite of his qualifications and experience, err in judgment at a critical time when he was more than a thousand miles from the coast, beyond the advice or the authority of the shipowner was a matter entirely "beyond the control" of the shipowner and, by this clause of the bill of lading, when supplemented specifically by the negligence clause, the shipowner is discharged from liability.

That such an exemption is reasonable is now recognized by our own statutes.

U. S. Statutes, 1893, Chap. 105, § 3.

(**b**) The opinion filed by a majority of the judges of the United States Circuit Court of Appeals, says:

" The master's unfounded but existing apprehension in regard " to the future relieves his conduct from the charge of barratry. " There was a destruction of property, but the Court says it was " not so much tainted with dishonest views or fraudulent breach " of trust as to come within the definition of barratrous conduct " " *(Opinion, Record, fol.* 1043*).*

If the master did, in fact, drive cattle overboard not for personal pecuniary profit, but for personal comfort and gratification *(Opinion, Record, fols. 1041, 1042)*, his conduct was barratrous, and the shipowners are relieved from responsibility by the exemption.

Barratry in a contract of carriage bears a different meaning than does the same word in a contract of insurance.

Carver's Carriage by Sea, 2d Edition, §§ 99, 100, pp. 107, 108, 109.

" Barratry means any willful act of spoliation or violence to the " ship or goods, or any fraudulent or consciously illegal act which " exposes the ship or goods to danger of damage, destruction or " confiscation, done by the master or crew without the consent of " the shipowner.

" For example, if goods are lost or damaged by the master " wilfully running the ship upon rocks or attempting to scuttle her ; " or through a fraudulent delay or deviation upon the voyage for " the master's private purposes ; or by the ship and cargo being " fraudulently sold by the master, the exception relieves the ship- " owner from responsibility for such losses. So, again, if the goods " become confiscated owing to the master using the ship for pur- " poses of smuggling, or trading with an enemy, or running a blockade. " *And the effect is the same, although the master was intending to act* " *for the benefit of the owners.*"

Carver's Carriage by Sea, 2d Edition, § 99, pp. 107, 108.

(**c.**) If the immediate cause of loss is to be deemed an accident of navigation, the shipowner is freed from liability, even though such accident was remotely due to the negligence, default or error in judgment of the pilot, master or mariners of the ship.

Carver's Carriage by Sea, 2d Ed., § 101, p. 110.
The Duero, L. R., 2 Ad. & Ecc., 393.
Grill vs. General Iron Screw Collier Co., L. R., 1 C. P., 600.
The Cressington, L. R., 1 Prob., 152 (1891).

Fourth.

IT IS A MATTER OF GREAT PUBLIC INTEREST THAT THIS COURT SHOULD DECLARE THE EFFECT OF A CLAUSE WHICH PROVIDES THAT THE BILL OF LADING SHALL BE GOVERNED BY A LAW OTHER THAN THE LAW OF THE PLACE OF ISSUE.

The question has arisen in numerous cases, but there is as yet no authoritative decision of any appellate tribunal.

The clause has been sustained as valid in the District Court of the United States for the District of Maryland.

The Oranmore, 24 Fed. Rep., 922.

It has been rejected as invalid in the District Court of the United States for the Southern District of New York, and in the District Court of the United States for the District of Massachusetts.

The Brantford City, 29 Fed. Rep., 373, 396.
The Guildhall, 58 Fed. Rep., 796.
The Iowa, 50 Fed. Rep., 561.

No appellate tribunal has passed upon the validity of the clause, and no certainty can be felt by the enormous commercial and shipping interests using bills of lading until the question has been adjudicated in this Court.

No question has ever been raised in either pleadings or proofs as to the regularity of the clause in the bill of lading.

It was there properly, in accordance with the terms of the original memorandum contract, and, though it was fully pleaded by the respondent, there has been no suggestion by the libellants of irregularity or surprise.

Fifth.

A WRIT OF CERTIORARI SHOULD BE GRANTED, DIRECTED TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, COMMANDING THEM FORTHWITH TO CERTIFY AND RETURN TO THIS COURT ALL OF THE PROCEEDINGS BY THEM HAD IN THIS ACTION.

BUTLER, STILLMAN & HUBBARD,
Proctors for Petitioner.

WILHELMUS MYNDERSE,
Advocate.

Supreme Court of the United States.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY, LIMITED, of Liverpool,

Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA, owner of the steamer HUGO,

Respondent and Appellant.

No. ~~296.~~ 249.

October Term, 1896.

BRIEF FOR THE APPELLANT.

This action originated in the District Court of the United States for the Southern District of New York, in a libel filed March 25th, 1892, by the libellants, who were the owners and insurers of one hundred and sixty-five head of cattle shipped at New York October 24th, 1891, on the steamer *Hugo*, for delivery at Liverpool, England.

The libel claimed damages in respect to one hundred and twenty-six head of cattle lost from the steamer during the voyage (*Libel pp. 1-3*).

The decree of the District Court was in favor of the libellants for the value of sixty-three head of cattle and of the freight prepaid thereon (*Decree p. 184*).

Both parties appealed from the decree and assigned errors. The errors assigned by the respondent related not only to the amount of the loss, but to the allowance of any decree against the respondent, error being assigned to the findings of the District Judge and to his refusal to give to the respondent the

benefit of the exemptions set forth in the bill of lading *(pp. 186, 187)*.

Upon the argument of the appeal in the Circuit Court of Appeals Judges SHIPMAN and LACOMBE directed that the decree of the District Court be affirmed *(Opinion, pp. 188–195)*, and an order to that effect was accordingly entered March 18th, 1895 *(Order, pp. 196, 197)*.

Judge WALLACE dissented from the majority of the Court and held that the loss of the cattle was due to a peril of the seas and not to any default of the respondent or its servants *(Opinion, p. 196)*.

On the 1st day of April, 1895, the respondent submitted to this Court its petition for a writ of *certiorari*, and on the 10th day of April such writ was issued in the usual form (*Writ of Certiorari, p. 198)*.

Statement of Facts.

In October, 1891, the libellants, William W. Brauer and Frederick C. Brauer, composing the firm of W. W. Brauer & Company, shipped on board the respondent's steamer *Hugo*, at New York, one hundred and sixty-five head of cattle, to be delivered at Liverpool.

The shipment had been provided for in a contract made two weeks earlier between the agent of the *Hugo* and the libellants, W. W. Brauer & Company.

By the terms of this contract, dated October 10, 1891, which was put in evidence by the libellants, the respondent let to the shippers

> " space for the transportation of live cattle on the steamer " *Hugo*, intended to sail from New York about October 24, " 1891, for Liverpool, England, for about 160 live cattle on the " upper deck * * * at the rate of fifty shillings British " sterling for each animal shipped on open decks " *(Exh. 2, p. 132)*.

The shipper agreed to prepay freight on the number of cattle shipped at New York,

> " vessel lost or not lost, and irrespective of the number landed " at the port of destination, and the shipper assumed all risk " of mortality or accident, however caused, throughout the " voyage " *(Exh. 2, p. 132)*.

Stalls were to be erected at the steamer's expense, and the steamer undertook to supply water for the use of the animals, space for their fodder, suitable gangways for loading the cattle, and free passage over and back to the drovers in charge of the animals (*Exh. 2, p. 132*).

It was further provided in the agreement that

"The line form of live stock bill of lading to be used "for cattle to be shipped under this contract, and its "conditions to govern any questions not provided "herein, subject to United States Government inspection" (*Exh. 2, p. 133*).

Under this agreement the libellants W. W. Brauer & Company, shipped on board the *Hugo* at New York, October 24, 1891, one hundred and fixty-five head of cattle, and, in accordance with the terms of the agreement, received a bill of lading, the material portions of which were as follows:

"Received in apparent good order and condition by the "Spanish steamer *Hugo*, from Wm. W. Brauer & Co., to be "transported by the good ship *Hugo*, now lying in the port of "New York, and bound for Liverpool, one hundred and sixty-"five live cattle on deck.

"On deck at owners' risk, steamer not to be held accounta-"ble for accident to or mortality of the animals from what-"ever cause arising. * * *

"It is mutually agreed that the carrier shall not be liable "for loss or damage occasioned by causes beyond his control, by "the perils of the sea, or other waters. * * * by collisions, "stranding or other accidents of navigation of whatsoever kind "(even when occasioned by the negligence, default or error in "judgment of the pilot, master, mariners or other servants of "the ship owner, not resulting, however, in any case, from "want of due diligence by the owners of the ship, or any of "them, or by the ship's husband or manager). * * *

"Also that this contract shall be governed by British law, "with reference to which law this contract is made.

"And, finally, in accepting this bill of lading, the shipper, "owner and consignee of the goods, and the holder of the bill "of lading, agree to be bound by all of its stipulations, excep-"tions and conditions, whether written or printed, as fully as "if they were all signed by such shipper, owner, consignee or "holder."

Exh. A, pp. 136, 137.

The libel was based upon the bill of lading (*Libel, fol. 7*), and upon an allegation that

"On or about October 31, 1891, the said vessel, having encountered some rough weather, the master and crew of said vessel became panic-stricken and drove overboard 126 head of cattle. The said vessel did not incur any extraordinary or unusual stress of weather, and the act of said master and crew in driving overboard said cattle was wholly unnecessary, and the loss of said cattle was due to the incompetency and lack of skill of the master and crew" *(Libel, p. 2)*

The libel further alleged that the libellants the Reliance Marine Insurance Company, Limited, of Liverpool, had made insurance upon the cattle for W. W. Brauer & Co. against perils of the seas, jettisons, barratry of the master and mariners, and had paid the insurance on the one hundred and twenty-six head of cattle lost *(Libel, p. 2)*.

The answer filed by the respondent denied the allegations of the libel respecting the circumstances under which the cattle were lost, and averred that

"The loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattle houses and set the cattle adrift, and that during the continuance of the perils, and by reason thereof, certain of the cattle were washed overboard and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or hopeless condition, and that upon such being taken to the gangways they were washed over by the seas, which were at the time so raging that one of the seamen of the steamer was washed from the deck into the sea" *(Answer, p. 5)*.

The answer further averred that:

"The care given to said cattle was according to the best judgment of the master of said steamer, and if he erred in his judgment or was in any degree negligent, which the respondent denies, that still this respondent is absolved from accountability and responsibility by reason of the terms of the bill of lading; and also that, by the law as administered in the Courts of Great Britain, the respondent, being itself without fault, is validly, under the terms of the said contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of the master, mariners or other servants of the respondent" *(Answer, p. 5)*.

The answer specially set up the terms and conditions of the bill of lading and claimed the benefits of its exemptions, and averred :

" That the contract should be construed and governed by " the law as administered in the Courts of Great Britain, with " reference to which law the contract was stated to be and was " made " (*Answer, p. 5*).

The *Hugo* was an iron steamer, of the highest class, and in good condition. Her length was 375 feet ; her beam 36 feet, and her depth of hold about 30 feet.

Under the contract the stalls for the cattle were to be erected by the ship. They were of the usual style and were properly constructed. As to this, there is no dispute (*Edwards, p. 77*).

The cattle were in charge of two drovers, Joyce and Edwards, with four assistants.

On the 30th of October the vessel met a storm, which continued until November 2d. During the continuance of the storm the steamer lay hove-to for thirty-six hours. When the storm was over one hundred and twenty-six cattle had been lost.

The proofs upon the trial were in serious conflict. The libellants presented proofs to show that the master was negligent in the navigation of his vessel, and that the loss of the cattle was due to that cause. They also presented proofs to show that the cattle had been driven overboard under the orders of the master of the steamer.

The respondent presented proofs to sustain the allegations of its answer.

The log of the steamer showed that in the afternoon of October 30th a heavy storm was encountered, as a result of which one hundred and twenty-six of the beasts perished, being killed or fatally maimed by the perils encountered, or swept overboard by the seas when the gangways were opened to clear the decks of the dead cattle. The log is printed at pages 138, 139 and 140 of the record.

It was provided by stipulation that the English judicial decisions, as contained in the printed reports of Law or Admiralty Courts, might be referred to by either party as evidence of the English common or maritime law as administered in the English Courts (*Stipulation, p. 130*).

The District Court held that, by the perils encountered, some of the cattle were fatally wounded or maimed and that others were cast overboard, or negligently suffered to go overboard, without any effort being made to separate the sound from the maimed *(Opinion, p. 155)*.

The District Court further held that the exemptions of the bill of lading, which provided that the cattle should be at owners' risk, and that the steamer should not be held accountable for accident to or mortality of the animals, or for any accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, were invalid as against the public policy of this country, and that the further stipulation substituting the British law for the law of the United States was likewise invalid *(Opinion, p. 155)*.

A decree was accordingly made in favor of the libellants for such of the cattle as were either in sound condition or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous *(Interlocutory Decree, p. 156)*.

The Commissioner, to whom reference was had to assess damages, reported :

" I am satisfied that much the greater portion of the 126 " cattle were set loose by the storm and thrown and rolled " about the deck during Saturday night and Sunday, and that " at least half of all that were lost were either dead or fatally " wounded or maimed and in a hopeless condition when they " were carried overboard. * * * My conclusion from the " whole evidence is in favor of probability that the proportions " between the dead and the fatally wounded, on the one hand, " and those that were alive and not fatally maimed or wounded, " on the other, are about equal " *(Report, Record, p. 179)*.

and he accordingly reported against the respondent for the loss of sixty-three cattle.

The report of the Commissioner was confirmed by the District Court as to the number of cattle for which the steamer was held liable, and a decree was accordingly entered *(Opinion and Decree, pp. 183, 184)*.

Both parties appealed to the United States Circuit Court of

Appeals for the Second Judicial Circuit, and on March 5, 1894, a decision was filed by a majority of the Court holding that the decree of the District Court should be affirmed.

The majority of the Court state:

"The reason for throwing both sound and maimed cattle over-
"board was a great dissatisfaction with the existing state of
"the decks, an apprehension that the state of things would
"continue, and a determination to put an end to trouble from
"cattle."

Opinion, p. 193.

The majority further held in regard to the sixty-three cattle for which the steamer was held liable that they were lost through

"an entire clearance of the decks without apparent necessity and
"without an effort to discriminate or save any, and that there
"was no pretense that it was to save the ship or the cargo, or
"that it was necessary to sacrifice the animals for the benefit of
"the survivors" (*Opinion, p. 194*).

And that

"The act of the master was not the result of an opinion that
"the drowning of the sound cattle was called for by pruden-
"tial consideration for the ultimate safety of the lives or the
"property in his charge" (*Opinion, p. 195*).

The majority of the Court also held that the English authorities cited to establish the British law did not control the case (*Opinion, pp. 194, 195*).

JUDGE WALLACE dissented from the opinion held by the majority, and said:

"I agree with the Commissioner when he says 'I do not
"'doubt the entire good faith of the master, and that he would
"'gladly have saved the other cattle, as well as the thirty-nine
"'that remained on board.' * * * I think a prudent re-
"gard for the safety of the ship and crew, in view of the sit-
"uation as it was at the time, justified him in clearing the deck
"of the mass of dead and wounded cattle, and that it is idle to
"say that there was any practicable opportunity upon that
"storm-swept deck to separate the dead cattle from the
"wounded and dangerous live ones. After the event, and with
"the wisdom which comes from retrospect, it is not difficult to
"conjecture in case of disaster what might have been done
"that was not done; but I am satisfied from the proofs that the
"master did everything which a prudent and honest navigator

" would have done under the circumstances from the time he " hove-to his vessel until the hurricane was over, and that the " loss of the cattle was caused by perils of the sea, and there- " fore within one of the excepted risks of the bill of lading." (*Opinion, p. 196*).

The majority further held that while the injury to and drowning of the maimed animals were caused by perils of the sea, the non-delivery of the sound cattle was not caused by perils of the sea or by accidents of navigation, or by circumstances properly incident to navigation (*Opinion, p. 195*).

The Court thereupon ordered that the decree appealed from be affirmed, and that a mandate issue accordingly (*Order, pp. 196, 197*).

POINTS.

First.

THE ACTION IS PROSECUTED IN THE COURTS OF THE UNITED STATES IN ATTEMPTED EVASION OF THE AGREEMENT " THAT THE " CONTRACT SHALL BE GOVERNED BY BRITISH LAW."

The libellants, attracted apparently by the decision in the case of the *Brantford City* (*29 Fed. Rep. 373*) have sought to build a similar case against the respondent, and have come far out of their way to bring suit in the same jurisdiction.

Liverpool was the port of destination. It was there that the Insurance Company, the principal libellant herein, and the only libellant that profits by the decree, had its principal offices, and it was there that the claim should have been presented and pressed, if presented and pressed at all.

Apparently no claim was presented there. But six months later the Insurance Company came to New York and instituted this suit.

They did not even have the excuse of coming here to enforce a lien upon the *Hugo*. The *Hugo* was not here. Jurisdiction over the respondent was obtained by attaching the steamer *Enrique* (*Libel Art. 8, p. 3*).

The libel alleged as the only incriminating facts :

" The said vessel having encountered some rough weather " the master and crew of said vessel became panic-stricken, " and drove overboard one hundred and twenty-six head of " cattle " (*Libel, Art. 2, p. 2*).

It alleged as the sole ground of fault :

" The act of said master and crew in driving overboard said " cattle was wholly unnecessary, and the loss of such cattle " was due to the incompetency and lack of skill of the master " and crew " *(Libel, Art. 2, p. 2).*

When the proofs, however, established remarkable perils, the libellants sought to change their ground upon the testimony of an expert that the master was in fault for not avoiding the storm, the witness having a theory that the master could, by change of course, have gone around the storm (*Hannah, p. 93*). This theory was soon practically abandoned.

Then the libellants shifted their ground once more, and made a third contention that though the storm was a severe one, and though the steamer could not avoid it, still she might have lessened its effect by taking the wind and sea on her bow, and heading into the storm (*Barclay, pp. 113, 114*). This contention will be considered later in its proper place.

Second.

THE LIBELLANTS DID NOT MAKE PROPER PROVISION FOR THE CATTLE.

By the terms of the contract the steamer was to supply space, stalls, water for the cattle and free transportation for the drovers in charge, not exceeding one man for every thirty cattle. The stalls were to be put up at the expense of the steamer to the satisfaction of the shippers, who agreed to assume all responsibility. There is no dispute that the stalls were properly constructed *(Edwards, p. 77).*

The shippers sent six men with their cattle. Only two of these men have been produced as witnesses. Joyce, who was the foreman, "was sick, very sick; he was useless for the work, "and did not want to perform any work during the trip" *(Gartiez, p. 47)*.

"He had consumption and you can examine him with the "doctors in case you have any doubt.

"Q. Wasn't he an efficient cattleman? A. No.

"Q. This was the foreman? A. Foreman.

"Q. Were the other cattlemen efficient? A. There were "three Jews, one German and an Irishman, and the three "Jews were worthless. Besides, they were lazy and did not "want to work. When I went to force one of them to work, "he came forward and made faces at me so that I should not "make him work" *(Gartiez, pp. 47, 48)*.

Gartiez' testimony as to Joyce's condition was confirmed by the fact that Joyce, when examined some months later, was found to be dying of consumption in a Baltimore hospital, and he himself complained of the men put under his charge, stating that he had some men that he could not trust; that he had "two cheap men, Jews" that he could not trust *(Joyce, p. 67)*.

The respondent's witnesses claimed that from the morning of October 31st to the morning of November 2d, no cattlemen were seen on deck *(Gartiez, pp. 43, 44, 47)*.

The master testified that he himself went on November 2d and compelled the foreman to get up and to get men to attend to and feed the cattle that remained alive *(Gartiez, p. 47)*.

Other witnesses confirmed captain Gartiez's statement that the cattlemen were not on deck during the two days of the storm *(Zaldegui, pp. 12, 15; Ormaechea, pp. 27, 30)*.

The men admitted that they made no effort to save or relieve the cattle *(Edwards, p. 79)*.

The District Judge summarized the men as "inefficient" *(Opinion, p. 147)*.

So conspicuously did the cattlemen abandon their posts and leave the burden of caring for the cattle upon the seamen, that the seamen claimed wages for performing the duties of the cattlemen *(Zaldegui, pp. 19, 20)*.

Third.

THE STORM ENCOUNTERED BY THE HUGO WAS ONE OF NOTABLE SEVERITY, AND THE LOSSES OF THE CATTLE WERE DUE TO THE PERILS INCIDENT TO THE STORM.

The undisputed fact that the *Hugo* was hove to for thirty-six hours indicates that there was no common peril (*Mudie, pp. 8, 9; Ex. C, pp. 138-140; Ex. D, pp. 139-143*).

The storm began Friday afternoon, October 30th, when a heavy sea destroyed the cattle houses on the port side, opposite hatches No. 4 and No. 3. Efforts were made to restore the pens, they were again broken by the seas and the cattle remained in the alleyways for the night (*Exh. C, p. 138*).

In the morning the stalls were rebuilt and the cattle were replaced, with the exception of one bullock, on hatch No. 5. The steamer was stopped for this operation (*Log, Exh. C, p. 138; Ormaechea, p. 28; Gartiez, p. 39*).

In the afternoon of Saturday, October 31, the wind came from the north northeast; heavy seas were running from the northeast, which had been the previous direction of the wind; the heavens were dark and the waves high, and at two o'clock some of the houses opposite No. 4 hatch were destroyed, and the oxen were loose. The engine was then stopped and the vessel hove to (*Log, Ex. C., p. 138; Ormaechea, p. 18; Gartiez, pp. 40, 41*). The pens had been broken, and the cattle "went "wherever they could go, escaping" (*Gartiez, p. 41*).

The master tried to arrange for placing the cattle in their houses; but it was not possible to do so. "and they came "through wherever there was room, and agglomerated them-"selves on the starboard side" (*Gartiez, p. 41*).

Later in the afternoon a gangway was opened on the starboard side opposite hatch No. 4. This was the very point at which the stalls had already sustained injury through the seas, and from which cattle had escaped.

While, undoubtedly, it would have been necessary, in order to open this gangway, to remove certain pens (unless the pens had already been destroyed by the waves), there is no proof whatever that any pens were torn down in which cattle were still standing, in order to reach that gangway.

The pens opposite that gangway on the port side of the vessel were those that had already sustained damage, and the cattle that had occupied those pens were loose on the deck; and the proofs are that the pens on the starboard side opposite gangway No. 4 had also been wrecked (*Ormaechea, p. 27; Gartiez, pp. 38, 39; Zaldegui, pp. 12, 16*). Zaldegui says the entire pen was down and the pieces carried clean across the ship. The posts were down and everything *(Zaldegui, p. 16)*.

On that afternoon, when gangway No. 4 was opened, some nine or ten cattle went out into the sea. They were the cattle from the wrecked pens. These cattle, when they went into the sea, were already "maimed and helpless" *(Opinion, District Judge, p. 145)*.

With a hurricane raging, with the cattlemen "inefficient," with the crew occupied in the care of their vessel, with the steamer shipping heavy seas upon her deck, with the pens in a more or less damaged condition, the master was called upon to contemplate the perils of approaching night and to determine the best method of meeting them.

He says:

"I convinced myself that I had tremendous weather, and "that I was to have a hurricane that night.

"Q. And then you opened the gangway? A. Towards "nightfall I opened the gangway of No. 4 hatch.

"Q. On the starboard side? A. On the starboard side, "and when it was opened some of the cattle went overboard. "On that same night, or rather this same afternoon, I opened "the gangways on the port and starboard side opposite the "deck house, because I supposed that in the horrible hurricane "that we would have during the night the waves would break "the cattle out of their places on the port and starboard bows "and carry them down to the alleyways where there was no re-"source for their safety. And as I thought, opening this dur-"ing the night, without my seeing them, but as I had ex-"pected, the cattle washed down; the waves broke the houses "and washed them down" *(Gartiez, pp. 41, 42)*.

All through that horrible night the master stood watch. Oil bags were placed in the water in an effort to calm the waves. When day broke on the morning of November 1st the tempest was still raging, and its cruel effects were seen upon the deck of the steamer.

The witness testifies as follows:

"When daylight appeared, I saw from here to here" (indicating the places where the stalls are on the starboard side)—"I saw there from the bridge, looking over myself, that many of the cattle had their legs sticking out the sides of the vessel through the rail—some one leg, others two legs, and others with all four. This must have happened without doubt during the night. * * * As I have said before, a great many of the cattle had their legs outside of the rail; the houses were broken—a few were not broken on the forward part of the ship; the cattle were all down, with the exception of those toward the bow, and some were dead, others broken, others with their horns broken off; some were on their backs, making a heap of cattle and boards all mixed in one. When I saw this condition of affairs, the first officer came to the bridge, where I had been all night, and I asked him his advice as to what to do in this situation. He says to me, 'The weather is too strong, the sea becomes more crested, 'the heavens still more threatening.'

"Q. How was the barometer? A. I then went to see the barometer, and during that time it was falling very rapidly. I expected that the hurricane would come with still much greater force.

"Q. Had waves been breaking over the vessel during this time? A. The waves would break on the deck, over the bridge, over the houses that had already been broken, and there was water everywheres. And there we could see a calamity. The opinion of the first officer and my own opinion, after having looked at the weather and the barometer, was to determine to open gangway No. 3.

"Q. About what time in the morning of November 1st was this? A. About 6 or 7 o'clock—just about daylight.

"Q. And then you opened gangway No. 3? A. Gangway No. 3 was opened. * * * We breathed happy when we saw it open.

"Q. Were the waves still washing over the ship? A. Yes, sir; and as soon as I opened the gangway all of that portion of the deck was cleared off, as they were all in a pile—all the oxen" *(Gartiez, pp. 42, 43).*

The first officer states that when morning came "the whole after part of the deck was a scene of destruction" *(Ormaechea, p. 29).* And when asked whether the crew breakfasted that morning, he replied:

"If a file of soldiers were put before you with their muskets pointed at you, would you feel like eating? With an out-and-out hurricane in the morning, all the after-deck a com-

" plete scene of destruction, all the oxen thrown from port to " starboard side, back and forth; such of the pens as remained " standing had only the roofs, and the sideboards had been " carried away and broken; all the flooring boards to which " the houses had been made fast were loose; during the night " all that had been opposite No. 4 hatch had been carried " away, and you would find the cattle, some with legs broken " and others dead; and, in view of all this, would you feel like " eating breakfast?" (*Ormaechea, p. 30*).

The seas were running from three different directions:

" Sometimes we had the seas from the north, and sometimes " from the northwest, and from the northeast—in three or four " directions" (*Ormaechea, p. 32*).

One seaman was caught by a wave and carried into the sea (*Enchortiata, p. 34*).

The boatswain says:

" It was a regular hurricane all night, and the engines " stopped" (*Zaldegui, p. 14*).

" The houses that we had repaired had broken immedi- " ately after, and the cattle thrown around, some laying down, " and some with broken legs, and getting along as best they " could" (*Zaldegui, p. 12*).

" Q. Did you sleep that night? A. Nobody.

" Q. Did you look at the cattle next morning? A. Yes, " sir; the decks was a regular slaughter house; all the cattle " houses were broken.

" Q. What was the condition of the cattle? A. The main " portion of them were dead, and a great many more with " broken legs; and some were alive from hatch No. 2 forward" (*Zaldegui, p. 14*).

" Q. How was the sea at this time? A. It was so heavy " that we could hardly look at it; it was breaking from one " side to the other" (*Zaldegui, p. 14*).

The carpenter says:

" Everything was broken and destroyed with the ex- " ception of a few houses on the forward part of the " vessel. Everything was destroyed in pieces from about here " (indicating No. 2 hatch) aft, from about No. 2, and No. 3 for- " ward.

" Q. Describe the condition of the cattle more fully. A. " Some were laying on their sides, others were dead, and others " were wounded.

"Q. How wounded? A. Some had their horns broken "and others were bruised by the general shaking up that they "had had with the tossing back and forth of the waves" (*Echevarria, p. 23*).

Against the graphic descriptions of these witnesses only two witnesses have been called by the libellants.

These men say that it was not blowing hard and that "it was not very rough" (*Edwards, pp. 70, 71*).

There was no "bad weather" (*Joyce, p. 52*).

"It was kind of squally" (*Joyce, p. 57*).

Joyce says:

"We got in the tail-end of a storm; blowing a little" (*Joyce, p. 51*).

The utter unreliability of the men is shown by their inaccuracy respecting matters concerning which there can be no dispute.

Edwards says it blew hard only eight hours (*p. 70*); that the steamer was hove to only twelve hours (*p. 70*), though she was unquestionably hove to for thirty-six hours.

He testifies that the cattle were driven overboard early Saturday morning (*Edwards, pp. 70, 71*), though it was not until Saturday afternoon that any gangways were opened, and it was during Saturday night and Sunday morning, November 1st, that the great proportion of the cattle went overboard. He says that the cattle were driven overboard from the port side, and that that was the lee side (*p. 72*); though there can be no question that the starboard side was the lee side, and that the cattle went over the starboard side.

He states that the number that went overboard was 165; whereas, it was only 126 (*Edwards, p. 75*).

He says the wind was N. N. W., and the seas not very bad (*Edwards, p. 76*); whereas the wind was N. N. E.

He says that the cattle were driven overboard either Friday or Saturday (*Edwards, p. 78*). And later he testifies that he does not know whether there was any necessity for driving them over or not (*Edwards, p. 79*).

Joyce states that on Thursday they got into the tail end of a storm which grew worse towards night; that Friday was the same as Thursday, only not quite so bad; that on Saturday it

commenced to get good weather, and that on Sunday "it was very fair, good weather" (*Joyce, pp. 51, 52*). He adds that there was no "bad weather," either Thursday, Friday, Saturday or Sunday (*Joyce, p. 52*).

The indisputable proofs in the case show, however, that the severe weather came on Saturday and Sunday, October 31st and November 1st.

Joyce says that the steamer was hove to for eighteen or twenty hours only (*Joyce, p. 55*); whereas, she was hove to for thirty-six hours.

He summarizes by saying that he would call it "squally weather" (*Joyce, p. 57*).

Fourth.

THE STEAMER WAS INTELLIGENTLY AND PRUDENTLY MANAGED AND NAVIGATED DURING THE STORM.

It seems scarcely necessary to give attention to the theory that the steamer could and should have known exactly when and from what direction the storm was approaching, and could and should have avoided the storm by a change of course.

This theory was one of the refuges sought by the libellants in the excitement of the trial. It was not suggested in their libel, and it was later apparently abandoned; if not formally abandoned, it must be deemed worthless in the face of the testimony produced by the respondent to meet it.

When captain Gartiez' first deposition was taken, the only charge against him was that set forth in the libel, of being "panic-stricken," and his deposition was directed to that point.

When the libellants, upon the trial of the cause, started a new theory, leave was obtained to re-examine captain Gartiez, and his further deposition was taken in New Orleans, in which he amply defends himself against the criticisms of captain Hanna (*Gartiez, pp. 127-130*).

The whole of captain Hanna's theory had been based upon the assumption that the change of the barometer indicates a

storm; a change of barometer indicates rain possibly; but it does not necessarily indicate the approach of wind (*Thompson, pp. 107, 108; Gartiez, p. 128*).

He later says: "I have gone with a high barometer in bad "weather and with a low barometer in good weather" (*Gartiez, p. 128*), meaning by "bad weather" violent winds.

Captain Thompson, of the *Bovic*, the great sister ship of the *Naronic*, and one of the most notable cattle vessels, testifies that such navigation as was suggested by captain Hanna is impracticable (*Thompson, p. 107*), and that there is no custom among navigators of steam vessels to attempt to avoid storms by changes of course (*Thompson, p. 107*).

The libellants, in calling another expert, captain Barclay, were practically compelled to abandon Hanna's theory; but they endeavored to prove by captain Barclay that, either the *Hugo* should have gone off straight before the seas, or, if the seas were too heavy for that, she should then heave to, head to to the sea (*Barclay, pp. 113, 114*).

This witness, however, overlooks the fact that the seas came from different directions, and that there was a heavy sea from the N. W., and another sea from N. and N. N. E. (*Log, p. 138; Gartiez, pp. 127, 129; Ormaechea, p. 27*). He overlooks, too, the build of the steamer. The *Hugo* was a long, slender vessel of only thirty-six feet beam. If she tried to head the seas she would plunge and cut down in them like a knife.

Captain Gartiez says that he could not have put his bow into the wind; that his engines were not powerful enough in that storm to hold her there (*Gartiez, p. 129*), and that, with the cross seas, it would have been impracticable to ho'd the vessel with her bows to one sea without catching the others disastrously.

Captain Thompson, of the *Bovic*, states that captain Gartiez's management was just right; that

> "a ship like the *Hugo*, or any small sized narrow ship, cannot "run off before the seas without the liability of taking a sea "over her stern and sweeping everything" (*Thompson, pp. 106, 107*)

and that it would not be practicable to put her bow to the sea, as "only vessels of high power can do that" (*Thompson, pp.*

105, 106); that the *Hugo* was only "small powered, and she "wouldn't be able to meet a heavy sea" *(Thompson, p. 106)*. He states that the proper procedure for a steamer is to stop her engines and take the sea on the quarter, that then "she is really hove to" *(Thompson, p. 106)*.

He explains that the propellor acts as a drag and holds the stern up to the sea, and that the steamer, for that reason, in heaving to lies just in the opposite way that a sailing ship would lie *(Thompson, p. 106)*.

The heaviest sea was from the N. W. *(Gartiez, p. 127)*; another sea came from N. or N. N. E.

The steamer lay, during the thirty-six hours that she was hove to, heading variously between E. S. E. and S. E. This brought the heavy sea almost astern, and brought the other seas abaft her beam and was the most favorable position possible *(Thompson, pp. 106, 107; Gartiez, p. 129)*.

Captain Barclay, the expert last called in the case by the libellants, admits that the judgment of the master must be the controlling judgment, and is much better than that of witnesses called to criticise.

"Q. Have you ever been, captain, in a serious storm at "sea? A. Yes; a great many.

"Q. And in occasions where you had to exercise your "own judgment as to the best navigation of your vessel? A. "Frequently.

"Q. When you have come ashore have you ever talked "over your experience in those storms with other mariners? "A. Occasionally; not very often.

"Q. And whose opinion would you go by in the matter of "the navigation of a vessel; your own or that of these persons "that you talked with after you came ashore? A. Decidedly "my own.

"Q. The master of a vessel is the only one who can deter-"mine the right thing? A. Yes, of course" *(Barclay, pp. 117, 118)*.

Fifth.

THE OPINION OF THE DISTRICT JUDGE AND THE OPINION DELIVERED BY THE MAJORITY OF THE JUDGES OF THE CIRCUIT COURT OF APPEALS ARE IN ERROR AS TO FACTS.

No witnesses were examined before the District Judge except the agent of the Reliance Marine Insurance Company, two experts, translators, who had conflicting views as to the meaning of certain words in the log, and an expert navigator.

The District Judge quotes at length from captain Gartiez's testimony. The quoted testimony related exclusively to the weather during the night of Saturday, October 31st, and the early morning of Sunday, November first.

The District Judge, after setting out the testimony in full, says:

"Notwithstanding this description of the situation during "Saturday, it is clear from the master's statement, and especi- "ally that of the first officer confirming the statements of the "cattle men, that before the night of the 31st there had been "but little damage to the cattle" *(Opinion, p. 152)*.

He evidently carries the impression that the captain's testimony of the distressed state of the cattle referred to Saturday afternoon and that there was a conflict between the master and the mate as to the condition of the cattle on Saturday afternoon.

The master's testimony, however, relates to apprehensions of the weather impending for the night, and to the severity of such weather during the night and the following morning.

Again the District Judge says:

"The master and first officer intimate that none but dead "animals or those with broken limbs were cast overboard. "The log imports no such restriction, while the testimony of "the boatswain and the carpenter show the contrary. It is "plain that the account given by the master and first officer "cannot be accepted without considerable abatement and "modification" *(Opinion, pp. 152, 153)*.

While the log does not go into details as to the condition of the cattle it describes them as

" some with their legs broken, others dead, with so much suf-
" fering, others with their legs tangled in the rail " (*Log, p. 146*).

and states that in the morning

" we immediately commenced the sad operation of throwing
" over all the cattle that were loose on the decks and in sorry
" plight " (*Log, pp. 146, 147*).

The boatswain and carpenter are naturally, from lack of education, unable to give as accurate descriptions as their superior officers, but there is absolutely nothing in the direct statements of either, or in the omissions of either, to throw discredit upon the testimony of the master and first officer.

The District Judge quotes freely from the boatswain's testimony, and italicises words to indicate that some of the cattle that went overboard were not actually dead.

From the middle of his liberal extracts he omits the boatswain's statement :

" The deck was a regular slaughter house; all the cattle
" houses were broken. Q. What was the condition of the
" cattle? A. The main portion of them were dead, and a
" great many more with broken legs ; and some were alive from
" No. 2 hatch forward " (*Zaldegui, p. 14.*)

Those remaining alive from No. 2 forward were the thirty-eight that survived the storm, and were subsequently delivered in Liverpool.

Another conspicuous error of the District Judge occurs in his statement :

" The carpenter also testifies that the stalls which had been
" broken at No. 4 hatch were repaired about 5 P. M. of Satur-
" day, the 31st, and the cattle put back in their places, and
" that the stalls remained in good order until they were again
" broken some time after " (*Opinion, p. 153*).

He omits to note that the carpenter's testimony that certain stalls were repaired at five P. M. related to the stalls on the " port side " (*Echevarria, p. 25*), whereas the statement that the " stalls remained in good order " related specifically to stalls on the " starboard side " (*Echevarria, p. 25*).

It is to be noticed that Edwards, who was the first witness examined by the libelants, has very little to say about the flooring being disturbed. He testifies explicitly on his examination:

"You see, some of the pens were loose on account of the "water *loosening the flooring* and broke the headboards, and "the sailors cut the ropes" (*Edwards, p. 22*).

After Edwards gave his testimony the witnesses from the steamer were examined in July, 1892. They confirmed Edwards in every particular as to the flooring being disturbed by the storm, and stated that the only floor they removed was that on the top of one of the hatches, to prevent the hatch being crushed in, as the cattle were hurled to and fro (*Zaldegui, pp. 15, 16, 18*).

Some months later the libellants produced Joyce, and then elaborated the theory of the flooring being torn out. But even Joyce admits that on the morning of Saturday, October 31st, the pens were rebuilt and the cleats replaced, which had been broken the night before, and the cattle which had passed the night in the alleyways were put back in the pens (*Joyce, p. 58*).

The report of Commissioner Taft is entitled to special weight in its recital of facts and in the credibility allowed to witnesses from the fact that the cattleman Edwards was produced before him. He saw him, saw how ready he was to rise to any emergency, even to the extent of saying that the cattle at the time they went overboard were in "first-class condition" (*Edwards, pp. 161, 162*).

The Commissioner's report, from pages 170 to 179, is probably as accurate a statement as can be made. It is impossible to read his report without coming to the conclusion that he felt that the master and officers of the *Hugo* performed their full duty during the period of this great distress, and that the statements made by them were consistent and credible.

His conclusion that the ship should be held liable for sixty-three of the cattle, was compelled by the stringent form of the interlocutory decree. That order compelled him to report the number of the cattle that were in his opinion not fatally wounded

or maimed at the time when the houses on the starboard side were broken up.

The proctors for the libellants argued strenuously before the Commissioner that, under the terms of that order, he was bound to report in their favor for the entire number of cattle lost.

This contention he did not sustain; but the constraint under which he acted by reason of the terms of the interlocutory decree are indicated throughout his opinion.

He reports:

"It was argued before me by respondent's counsel that, so "far as any cattle that were not fatally wounded or maimed "may have gone overboard, it was a necessary incident to "clearing the deck of the wrecked and ruined cattle, and ought "not to be ascribed either to negligence or design on the part "of the master" *(p. 174)*.

This very reasonable and moderate plea was overruled by the Commissioner, who said:

"This view appears to me to conflict too directly with the "decree of the Court to admit of being entertained by me" *(p. 174)*.

He even feels constrained to hold that, as to the cattle that went out through some of the open gangways during the night at the time when the waves were rolling over the vessel and the darkness prevented any one's seeing what occurred, "must be "regarded as 'designedly suffered' to go overboard" *(p. 173)*.

The Commissioner does not report that any cattle were "driven overboard." His report relates only to those "suf-"fered" to go overboard *(Report, p. 174, fols. 908, 939)*, under the construction of the interlocutory decree which he felt constrained to adopt.

The Circuit Court of Appeals, after reviewing the opinions of the District Judge and of the Commissioner, make their conclusions as follows:

"The fact that the flooring and cleats were taken up so "that the cattle might have no foothold during the night but "were carried down to the gangway by the rolling of the ship, "is significant that the captain wanted to expedite the de-"livery of the cattle into the ocean. He wanted this not for

" the safety of the ship, or to end the sufferings of the maimed " cattle. The preparations were made so that the sound as " well as maimed cattle could be washed overboard. Whether " during the night sound cattle were actually washed overboard " cannot be known with certainty. On Sunday morning the " testimony makes it apparent that the master determined to " rid the ship of every head of cattle except those under the " turtle-back. He intended to clear the decks of cattle whether " well or injured, and no effort was made 'to separate the " 'sound from the maimed.' The cattle not injured were " pushed or prodded and driven across the slippery iron deck, " and were hurried over the gangways as rapidly as possible " and in a short space of time. 'No attempt was made to dis- " 'criminate or to save any,' because the master and the crew " wanted none saved. We concur with the District Judge in " the conclusion that there was 'no reasonable or apparent " 'necessity' for the non-existence of an attempt to separate " the two classes. There was a storm, but nothing belonging " to the ship was injured. No one testifies that anything was " loosened or unshipped or that there was any leakage, and no " one claims that she was in pressing peril. The sacrifice was " not to save the vessel or her cargo, but the presence of the " cattle during the storm was a great inconvenience and there " was, as found by the District Judge, an apprehension that " the storm would continue, and that the existing inconveni- " ence would be increased. The reason for throwing both " sound and maimed cattle overboard was a great dissatisfac- " tion with the existing state of the decks, an apprehension " that the same state of things would continue, and a de- " termination to put an end to trouble from cattle." (*Opinion, p. 193*).

The citations already made indicate the errors of the Circuit Court of Appeals in respect to the removal of the floors and cleats (*supra pp. 21, 22*).

The gravamen of the decision of the majority of the Circuit Court of Appeals is in the alleged failure of the master to separate the sound cattle from the maimed.

The proofs establish that efforts to preserve the cattle were made as long as efforts were in any way reasonable or practicable.

On Friday afternoon, a heavy sea destroyed cattle houses on the port side opposite hatches No. 4 and No. 3. Though efforts were made to restore the pens, they were broken down again

by the seas, and the cattle remained in the alleyways for the night.

In the morning the cattle were restored to the pens, the steamer being stopped, that the work of reconstructing pens might be performed.

At two o'clock Saturday afternoon some of the houses opposite No. 4 hatch were again destroyed, and the oxen were loose on the deck.

The master testifies that at this time, he endeavored to place the cattle in their houses; but that it was impossible to do so (*Gartiez, p. 41*). And in this he is not contradicted by the cattlemen, and as the Commissioner finds:

> " Nor do I see that the cattlemen showed any disposition " to try to do so or to seek to have it done " (*Commissioner's Report, p. 172*).

Night was then approaching, the storm was increasing, the cattlemen were "inefficient", the perils of the night were rightly apprehended by the master, and he made provision for the inevitable disasters that were impending by opening certain of the gangways.

The opening of these gangways could do no injury. So long as the cattle were in their pens, the fact that the gangway was open did not imperil them; but, in the event of their pens being broken and the cattle being loose, the open gangways afforded a means of relieving the ship of the dangerous presence of the wrecked beasts.

The terrible condition of the decks on the morning of November 1st has already been described in the language of the witnesses. All the pens from the No. 2 hatch aft were wrecked, and the deck was like a " slaughter-house." Among the maimed cattle there may have been some that had not received absolutely fatal injuries. But with the storm then raging and threatening to become worse, we submit that the Judges below had no right to impose upon the master the duty of separating " the sound from the maimed " (*Opinion, p. 155*). Such a requirement goes beyond the bounds of the practicable.

No man on board the *Hugo* thought of such a thing. Not one of the cattlemen suggested it, and we submit, very respectfully, that the laying down by the District Judge and by the majority of the Circuit Judges of such a rule indicates clearly

that they have not realized, or begun to realize, the situation of a vessel at sea in a hurricane.

Who was to determine whether a beast was sound or injured? How was such person to measure the extent of the injuries? Was he bound to go among the struggling beasts on a wave-swept deck?

Upon this point, which was apparently deemed the controlling point in the Circuit Court of Appeals, Judge WALLACE dissents, saying:

"I do not think that the master sacrificed the uninjured "cattle simply for the sake of the comfort and convenience of "the ship. I agree with the Commissioner when he says 'I do "'not doubt the entire good faith of the master, and that he "'would gladly have saved the other cattle as well as the "'thirty-nine that remained on board.' The theory of the "libel is that the master and crew of the vessel became 'panic-"'stricken' and drove the cattle overboard; and the evidence "more nearly supports this theory than the one which has "been adopted. I think a prudent regard for the safety of the "ship and crew in view of the situation as it was at the time, "justified him in clearing the deck of the mass of dead and "wounded cattle, and that *it is idle to say that there was any "practicable opportunity upon that storm-swept deck to sep-"arate the dead cattle from the wounded and dangerous live "ones.* After the event, and with the wisdom which comes "from retrospect, it is not difficult to conjecture, in case of "disaster, what might have been done that was not done, but "I am satisfied from the proofs that the master did everything "which a prudent and honest navigator would have done "under the circumstances from the time he hove to his "vessel until the hurricane was over, and that the loss of the "cattle was caused by perils of the sea, and, therefore, within "one of the accepted risks of the bill of lading." (*Opinion, p. 196*).

We urge that it cannot be held that a single sound beast, or a beast with any commercial value, was lost *negligently*. Possibly some were not dead, and it is within the range of possibility that some of them might have lived until they reached Liverpool, for the officers admit that certain beasts were on their feet, and ran forward through the gangway. But the loss of those that went through the gangway was not a *negligent loss;* it was a loss incident to the gangways being open; open, that the vessel might be freed from the dead and wrecked cattle.

The maimed and wounded cattle were commercially worthless. This is proved by the fact that the only one of the maimed cattle that did not go overboard through the open gangways died before it reached Liverpool.

Edwards says that one of the cattle that was originally in the after part of the vessel "happened to be a little wilder than "the others, and he run in amongst these that were in the "whaleback forward" (*Edwards, p. 75*), and that that animal "died as the result of the knocking about" it had received (*Edwards, p. 75*).

The respondent's witnesses testified as follows respecting the condition of the cattle : Zaldegui says that not one of the cattle could have lived ; "that they were all badly injured" (*p. 15*).

Echevarria says : "They could not have lived, because they "were all destroyed" (*p. 24*).

The first officer says : "My opinion is that after having "suffered so much I do not think they could have lived" (*Ormaechea, p. 31*). And he refers to the one that remained injured and wounded on board, and that died a few days later.

The master, captain Gartiez, had carried cattle as cargo for thirteen years. In 1887 he had lost twelve cattle—carried away by the sea—and he had had no other accident during his whole experience (*Gartiez, p. 43*).

He says, in respect to the cattle on the *Hugo :*

"Those oxen were too much damaged to have been saved, "because those that lay on their backs, with their feet and legs "in the air, it was impossible to save them" (*Gartiez, p. 43*).

Upon the reference before the Commissioner, Edwards admitted that, under the regulations of Liverpool, where the cattle where bound, no maimed or sick cattle are permitted to be landed (*Edwards,p. 166*).

Sixth.

THE FACT THAT THE LOSS WAS A LARGE ONE DOES NOT CARRY ANY PRESUMPTION THAT IT WAS A NEGLIGENT LOSS.

The agent of the Reliance Marine Insurance Company, one of the libellants, testifies to insurances made by his Company upon cattle between October 19th and November 8th *(p. 100)*, and shows that out of nine steamers so insured only two had material losses, the *Hugo* losing 127 and the *Alsatia* 75 (*Despard, p. 101*). The large loss of the *Alsatia* was accounted for by saying that her fitness as a cattle vessel was "not very good" (*Despard, p. 102*), explaining that for a cattle vessel the dimensions are important, and that although the *Alsatia* had a general rating of 100 A1, the highest rating, she was not a very good cattle vessel because of her narrow beam; her beam being "under forty feet, I think thirty-seven" (*Despard, pp. 103, 104*).

The *Hugo*, though also holding the rating 100 A1, was of even narrower beam than the *Alsatia*, the *Hugo's* beam being only thirty-six feet (*Gartiez, p. 37*).

A long list of vessels carrying cattle to Liverpool from Boston, New York, Montreal, Baltimore and Norfolk during the latter part of October and the early part of November 1893 was put in evidence (*Exh. 3, pp. 134, 135*).

The exhibit shows that at least one vessel sustained a heavier loss than the *Hugo*.

The *Venetian*, sailing from Boston, October 20th, four days before the *Hugo* sailed from New York, lost 188 cattle (*Exh. 3, p. 135*).

The *Alsatia*, which sailed five days later than the *Hugo*, lost 75.

The *Baltimore* lost 51.

The *St. Pancras* lost 30.

These figures show that losses of cattle are *incident to the business* of transporting live cattle at sea. They are losses that the libellant Insurance Company should be content to bear.

Captain Gartiez had carried cattle for thirteen years and, aside from twelve cattle lost in 1887 swept off by a sea, he had

no other accident than on this unfortunate voyage (*Gartiez, p. 43*). The percentage of cattle lost by captain Gartiez during his long experience is far smaller than the percentage of loss upon the fleet of steamers all taken together, sailing in October and November 1891 (*Exh. 3, pp. 134, 135*).

The only allegation of fact made in the libel, to-wit: "the "master and crew of the vessel became panic-sticken and "drove overboard one hundred and twenty-six head of cattle", is disproved.

No live cattle were thrown overboard with a single exception (*Zaldegui, p. 17*).

Ormaechea says there was one that was thrown over (*Ormaechea, p. 32*). This one, he says, "was one that had lain "on No. 3 hatch, and was nearly dead, with his tongue stick-"ing out, and was the only one we threw overboard" (*Ormaechea, p. 32*).

This one he refers to earlier (*Ormaechea, p. 28*) as being injured by being jammed during the night of the 30th between the donkey engine and the corner of the passage, the houses having been broken the day before, and certain of the cattle passing the night in the alleyways. It is the throwing of this bullock over, in its perishing condition, that affords the sole foundation for the stories of the two cattlemen. They deal in generalities with much volubility, but when they are asked to give an instance of live cattle being thrown over, they can only call to mind "the white bullock" that lay on the hatch and that couldn't rise (*Joyce, pp. 54-56*).

The Commissioner does not report that a single live beast was thrown or driven overboard (*Commissioner's Report, pp. 170-180*).

Seventh.

THE LAW OF GREAT BRITAIN SHOULD BE APPLIED TO THE CONSTRUCTION OF THE CONTRACT AS SET FORTH IN THE BILL OF LADING, AND THE COURTS HAVE ERRED IN OMITTING TO APPLY SUCH LAW.

In the bill of lading the following provisions are found:

"This contract shall be governed by the British law, with "reference to which law this contract is made.

"Finally, in accepting this bill of lading, the shipper, owner "and consignee of the goods, and the owner of the bill of lad- "ing, agree to be bound by all its stipulations, exceptions and "conditions, whether written or printed, as fully as if they were "all signed by such shipper, owner, consignee or holder" *(Exhibit A, p. 137).*

On October 10, 1891, two weeks before the bill of lading was issued, a contract had been made for the shipment of cattle "on the upper deck." That contract provided that this very bill of lading should be used *(Exhibit 2, p. 133)*, and specifically provided that the shipper "assumed all risks of mortality or accident, however caused, throughout the voyage" *(Exhibit 2, p. 132).*

In a recent case, it was held by this Court that a similar preliminary contract was a mere memorandum between the parties, and that the relations of the parties were to be governed by the provisions of the bill of lading.

The Caledonia, 157 U. S., 124, 139.

In the case now under consideration there can be still less question that the bill of lading is the controlling contract for the reason that the preliminary contract provided in terms for this form of bill of lading, and the bill of lading was subsequently accepted by the shipper as being strictly in line with the preliminary contract. So far from being objected to or protested against in any way by the libellants, they founded their libel upon it *(Libel, Art. 1, p. 2).*

It is fair to say, therefore, that the parties deliberately chose to submit the question of responsibility under the contract to the law of Great Britain.

In the case of the *Montana* this Court held:

"The review of the principal cases demonstrates that "according to the great preponderance, if not the uniform con- "currence, of authority, the general rule that the nature, the "obligation and the interpretation of a contract are to be gov- "erned by the law of the place where it is made, unless the "parties at the time of making it have some other law in view, "requires a contract of affreightment made in one country "between citizens or residents thereof, and the performance of "which begins there, to be governed by the law of that country, "unless the parties, when entering into the contract, clearly "manifest a mutual intention that it shall be governed by the "law of some other country.

"There does not appear to us to be anything in either of "the bills of lading in the present case tending to show that "the contracting parties looked to the law of England, or to "any other law than that of the place where the contract was "made."

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397, 458.

The Court held in that case that there was nothing to indicate that the contracting parties looked to any other law than the law of the United States.

In the case under consideration, however, it is apparent that the parties *did* look to the law of England; that they deliberately chose it; that it was not an exaction from a shipper by a carrier, but that it was in accord with a preliminary contract, freely made and unobjected to.

The cattle were destined to an English port. It was fitting that reference should be made to the law of that port. Any differences between shippers and ship-owners would naturally be submitted to the law of the place where their relations terminated.

Moreover, the Reliance Marine Insurance Company (Limited), which represents the entire interest of the libellants (*Libel, pp. 1, 2; Assignment Exh. 1, p. 131*), is a British corporation having its principal office in Liverpool, the port of the *Hugo's* destination.

The validity of the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law."

Railroad Company vs. Lockwood, 17 Wallace 357, 380, 382.

It is just and reasonable to apply the British law—the law of the port of destination.

Proof of the English law was made under a stipulation, which provided:

"It is hereby stipulated that the English judicial decisions, as contained in the printed reports of the Law or Admiralty Courts, may be referred to by either party as evidence of the English common or maritime law as administered in the English Courts" (*Stipulation, p. 130*).

The following cases were cited by the petitioner in the District Court and in the United States Circuit Court of Appeals:

The Duero, L. R., 2 Ad. & Ecc., 393 (1869).
Grill vs. General Iron & Screw Collier Co., L. R., 1 C. P., 600 (1866).
The Cressington, L. R., 1 Prob., 152 (1891).
Burton vs. English, L. R., 12 Q. B. Div., 218 (1883)

(*Record, fol. 247*).

The application of these cases respectively to the several exemption clauses of the bill of lading will be hereafter considered.

The District Judge declined to enforce the English law, upon the ground that the stipulation in the bill of lading providing for the application of the British law was invalid as against the public policy of the United States (*Record, p. 155*).

A similar provision has, however, been sustained in the District Court of Maryland.

The Oranmore, 24 Fed. Rep., 922, 927.

The United States Circuit Court of Appeals avoided any discussion of the application of the British law, disregarding certain of the exemption clauses, and holding in respect to others that the facts did not render the question of applying the British law material (*Opinion, pp. 194, 195*).

The case of *Oscanyan vs. Arms Co., 103 U. S., 261*, which has been cited in opposition, is not pertinent, for the reason that the suit was founded on a *turpis causa*, arising and performed wholly within the United States; nor is the case of

Rousillon vs. Rousillon, L. R. 14, Chan. Div., 351, for the reason that the contract there sued upon was in fact enforced, though Justice FRY did say *obiter* that, if a contract valid in France was made in France *to be performed in England,* the English courts would not enforce it if it was against the morals or public policy of England (*pp. 357, 369*).

Eighth.

THE PROVISION IN THE BILL OF LADING THAT THE CONTRACT BE GOVERNED BY BRITISH LAW IS NOT INVALID.

It cannot be fairly said that there is a question in the case whether or not it is against the public policy of this country to permit a carrier by sea to exempt himself from the consequences of his servants' negligence or error. The real question is whether it is against the public policy of this country to permit ship owner and shipper to agree in New York that their contract for a shipment of cattle from New York to England shall be construed according to the place where the final performance of the contract takes place and where, if anywhere, differences as to the performance by the carrier of his engagements would naturally arise.

It is especially proper that where a contract relates to transportation on the high seas from one nation to another, the entire transaction not being under the jurisdiction of any one nation, the parties shall declare in their contract the jurisdiction by the laws of which they intend their contract to be governed.

With such declaration made, it is against public policy and against commercial integrity to permit either party, and especially the party with whom the right to select the forum rests, to insist that the law of the forum, and not the law stipulated in the contract, should be applied to the construction of the contract.

It has been said by this Court that it is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants.

Railroad Company vs. Lockwood, 17 Wallace (U. S.), 357, 378.

The rule has been extended from the strict obligations resting upon a carrier by land, to cover those of a carrier by sea.

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397.

At the time this latter decision was made there was no legislative distinction between the obligations and rights of a carrier by sea and of a carrier by land.

Nor, indeed, was there any such distinction at the time these cattle were shipped upon the *Hugo*. But Congress, with whom certainly rests the right to declare the public policy of a country, have since that date passed an Act which provides in terms that :

" If the owner of any vessel transporting merchandise or " property to or from any port in the United States of America, " shall exercise due diligence to make the said vessel in all " respects seaworthy and properly manned, equipped and sup- " plied, neither the vessel, her owner or owners, agent or char- " terers, shall become or be held responsible for damage or " loss resulting from faults or errors of navigation, or in the " management of said vessel, nor shall the vessel, her owner or " owners, charterers, agent or master be held liable for losses " arising from dangers of the sea or other navigable waters, " &c., &c."

27, U. S. Statutes at Large, page 445, Chap. 105, § 3.

The owners of the *Hugo* exercised "due diligence" in the selection of a master.

Captain Gartiez had been nineteen years at sea, and nine years as master of an ocean steamer. He held proper certificates from the Government of Spain as to his competency (*Gartiez, pp. 36, 37*). During thirteen years he had experience in the carriage of cattle, and he had commanded the *Hugo* two years and a half (*Gartiez, p. 37*). In carrying cattle he had been peculiarly capable and fortunate (*Gartiez, p. 43*). As to his general competency the District Judge says :

" His record as a master appears to have been good, and " on any doubtful question of navigation he is entitled to the " benefit of his record." (*Opinion, p. 154.*)

Judge WALLACE, in his opinion, says:

" I am satisfied from the proofs that the master did every- " thing that a prudent and honest navigator would have done " under the circumstances from the time he hove to his vessel " until the hurricane was over." (*Dissenting Opinion, p. 196*).

If, therefore, this loss had occurred subsequent to July 1st, 1893, there would have been no recovery for the libellants under the laws of the United States.

Prior to July 1st, 1893, there could be no recovery for the libellants according to the laws of Great Britain and to those laws they should be remitted.

The Act contains another significant feature.

By Section 1 of the Act it is provided that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the vessel did exercise due diligence to properly equip the vessel, and to make her seaworthy, and whereby the obligations of the master, officers or servants to carefully handle and stow the cargo, and to care for and deliver it, shall in anywise be lessened, weakened or avoided.

Section VII., however, specifically provides that the provisions of Section I. " shall not apply to the transportation of " live animals."

This indicates, not only a recognition by Congress, that the carrier by sea shall not be held to the strict accountability of a carrier by land, but, further, that the carrier of live animals by sea should be permitted, in distinction from carriers of other merchandise, to insert provisions in the bill of lading specifically exempting him from responsibility for the acts of master, officers or servants.

The reason is not hard to find. The transportation of live animals involves peculiar difficulties. The animals are ordinarily carried on deck, and may become, if not an actual danger to the vessel and cargo, at least an obstruc-

tion to navigation and a threat of danger. In the treatment of such cargo opinions may well vary. Congress, therefore, sees fit not only to remove from the ship owner all responsibility for the acts of his servants at sea, but to permit him, in respect to live cattle, to specifically recite such exemption in the bill of lading.

Ninth.

IF THIS COURT WILL NOT RE-EXAMINE THE FACTS, AND ACCEPTS THE FACTS AS FOUND BY A MAJORITY OF THE JUDGES OF THE CIRCUIT COURT OF APPEALS, STILL NO LIABILITY RESTS UPON THE SHIP OWNER FOR THE LOSS OF LIBELLANTS' CATTLE UNDER THE CONTRACT OF SHIPMENT, SUCH CONTRACT BEING GOVERNED BY THE LAW OF GREAT BRITAIN.

A majority of the Judges of the United States Circuit Court of Appeals found, as facts, that :

" The injury to and drowning of the maimed animals were " caused by the perils of the sea, but that the non-delivery of " the sound cattle was not caused by a peril of the sea or the " accidents of navigation or circumstances properly incident to " navigation " (*Opinion, p. 195*).

The majority further held, as a matter " undoubtedly true," that the fatally-injured cattle were " properly thrown over- " board " (*Opinion, 193*).

The majority further held that it was apparent

" that the master determined to rid the ship of every head of " cattle except those under the turtleback. He intended to " clear the decks of cattle whether well or injured, and no " effort was made ' to separate the sound from the maimed.' " The cattle not injured were pushed or prodded and driven " across the slippery iron deck, and were hurried over the " gangways as rapidly as possible, and in a short space of time. " ' No attempt was made to discriminate or to save any,' be- " cause the master and the crew wanted none saved. We con- " cur with the District Judge in the conclusion that there was " ' no reasonable or apparent necessity ' for the non-existence " of an attempt to separate the two classes " (*Opinion, p. 193*).

The majority further held that :

" The sacrifice *was not to save the vessel or her cargo*, but " the presence of the cattle during the storm was a great in- " convenience, and there was, as found by the District Judge, " an apprehension that the storm would continue, and that the " existing inconvenience would be increased. The reason for " throwing both sound and maimed cattle overboard was a " great dissatisfaction with the existing state of the decks, an " apprehension that the same state of things would continue, " and a determination to put an end to trouble from cattle " (*Opinion, p. 193*).

And further :

" It was an entire clearance of the decks without apparent " necessity, and with no attempt to discriminate or save any. " *There was no pretense that it was to save the ship or the cargo* " *or that it was necessary to sacrifice these animals for the benefit* " *of the survivors*" (*Opinion, p. 194*)

And further :

" The act of the master was *not* the result of an opinion " that the drowning of the sound cattle was called for by pru- " dential considerations for the ultimate safety of the lives or " the property in his charge " (*Opinion, p. 195*)

The finding of the Commissioner that the cattlemen showed no disposition to try to save any of the cattle, or to seek to have them saved (*Report, p. 172*), is not referred to by the majority of the Court, nor is there any reference to the argument of the respondent that the loss of those cattle that were not fatally wounded was a necessary incident to clearing the deck of the wrecked and maimed cattle, and ought not to be ascribed to either negligence or design on the part of the master (*Report, p. 174*).

Taking the facts just as they are stated by the majority of the Court, the worst case that is established is one of *unjustifiable jettison* by the master, either through panic or unfounded apprehension.

There are several exemption clauses to be considered.

A It was recited in the bill of lading that the cattle were shipped " on deck at owners' risk " (*Exhibit A, p. 136*).

That such a provision should be made respecting a shipment of live animals to be transported on the deck of a freight steamer across the Atlantic, at a tempestuous season of the year, was eminently proper, and due allowance for the risks assumed by the owner of the cattle was undoubtedly made in the rate of freight at which the cattle were accepted for carriage.

In the case of *Burton vs. English*, a similar clause "The "steamer shall be provided with a deck cargo, if required at "full freight, but at merchant's risk" was considered by the Judges of the Queen's Bench Division, who substantially held that it relieved the ship owner from all responsibility for the acts of his servants, except responsibility to contribute in general average in case of lawful jettison or other lawful sacrifice.

Justice BRETT said:

"It is obvious that this is a stipulation in favor of the ship-"owners, for, in order to earn a larger freight, that they may "require part of the cargo to be deck cargo, and then it is to "be at the merchant's risk. My brother CAVE, who delivered "the judgment of the Divisional Court, held that this stipula-"tion absolved the shipowners from liability to contribute to "general average. It must be admitted that if there were an "*improper jettison* by the master and crew, this stipulation "would relieve the shipowners from liability. * * * If the "liability is in consequence of any act of any of his servants for "which the shipowner would be liable but for this stipula-"tion, then it follows that the defendants are freed from "liability. I should say that this stipulation would cover any "act of the master or crew, which being done by them as serv-"ants of the shipowner would otherwise make him liable; *it* "*therefore covers the case of improper jetitson, also a loss caused* "*by a collision or stranding owing to the negligence of the mas-*"*ter or crew.*"

Burton vs. English, L. R., 12 Q. B. Div., pp. 218, 219, 220.

Justice BOWEN said, respecting the clause:

"Now, that clearly is a stipulation in favor of the shipown-"ers, and *prima facie* it seems to me meant to relieve them "from the responsibility of some act of their servants by "which they would otherwise be bound, and from the incidents "of some risk which otherwise would fall upon them as carriers "and under their contract of carriage. *It would, I think,* "*clearly cover improper jettison, also it would cover negligence*

" *of the captain or crew, occasionally stranding or collision, and* " *any other acts, if any there be, of the servants of the shipown-* " *ers for which they would otherwise be responsible.*"
Burton vs. English, L. R., 12 Q. B. Div., 218, 223.

Justice BAGGALLAY concurred in the view of Justices BRETT and BOWEN.

See, also,

Lewis vs. The Great Western Ry. Co., L. R., 3 Q. B. Div.. 195.

McCawley vs. Furness Ry. Co., L. R., 8 Q. B. 57 (1872).

In the latter case the Court says :

" The plea states that it was agreed that the plaintiff, being " a drover travelling with his own cattle, should travel at his " own risk ; that is, he takes his chance, and, as far as having " a right to recover damages, he shall not bring an action " against the company for anything that may happen in the " course of the carriage. It would of course be quite a differ- " ent thing were an action to be brought for an independent " wrong, such as an assault, or false imprisonment. Negli- " gence in almost all instances would be the act of the com- " pany's servants, and ' at his own risk ' would of course ex- " clude that, and gross negligence would be within the terms " of the agreement ; as to wilful, I am at a loss to say what " that means ; but any negligence for which the company " would be liable (confined, as I have said, to the journey, and " it is so confined by the declaration) is excluded by the " agreement ", *pp. 59. 60.*

If sixty-three sound cattle went overboard from the *Hugo*, and their loss is to be attributed to *unjustifiable or improper jettison*, then, under a proper application of the clause " on deck at owner's risk," as construed under the British law, the shipowner is exempt from liability.

The clause referred to was not considered at all by the Judges of the United States Circuit Court of Appeals.

B. A further clause of exemption is contained in the words :

" Steamer not to be held accountable for accident to or " mortality of the animals, from whatever cause arising " (*Exhibit A, p. 136*).

The only question under this exemption, is whether the loss of the cattle was either an " accident " or " mortality." If it was, the clause gives valid exemption to the ship owner.

This clause has already received some consideration from this Court in the case of the *Caledonia*, when it was held that it did not relieve the ship owner from his obligation to provide a seaworthy vessel.

The Caledonia, 157 U. S., 124, 139.

We submit that inasmuch as much the greater portion of the animals lost were wrecked and maimed by perils of the seas, and as the gangways were properly opened to permit the dead and wounded beasts to be swept into the sea, the loss of the others, even if sound, was a necessary incident to clearing the deck, and is in that sense to be deemed " accidental."

C. A further exemption is found in the words :

" It is also mutually agreed that the carrier shall not be " liable for loss or damage occasioned by causes beyond his " control, by the perils of the sea, or other waters * * * " by barratry of the master or crew * * * by collisions, " stranding, or other accidents of navigation, of whatsoever " kind (even when occasioned by the negligence, default or " error in judgment of the pilot, master, mariners or other " servants of the ship owner "), etc., etc. (*Exhibit A, p. 136*).

(**a**) No consideration was given by the Judges of the United States Circuit Court of Appeals to the exemption for loss or damage " occasioned by causes beyond his (the ship- " owner's) control."

The shipowner provided a seaworthy vessel and manned her with a sufficient crew, and placed her under the command of an experienced master, so that, when she started upon her voyage, she was in every way fitted therefor.

That the master should become unreasonably panicstricken, if such was the fact, or that he should, in spite of his qualifications and experience, err in judgment at a critical time when he was more than a thousand miles from the coast, beyond the advice or the authority of the shipowner was a matter entirely " beyond the control " of the shipowner and, by this clause of the bill of lading, when supplemented specifically by the negligence clause, the shipowner is discharged from liability.

That such an exemption is reasonable is now recognized by our own statutes.

27 U. S. Statutes at Large, p. 445, Chap. 105, § 3.

(**b**) The opinion filed by a majority of the judges of the United States Circuit Court of Appeals, says :

" The master's unfounded but existing apprehension in re-
" gard to the future relieves his conduct from the charge of
" barratry. There was a destruction of property, but the Court
" says it was not so much tainted with dishonest views or
" fraudulent breach of trust as to come within the definition of
" barratrous conduct " (*Opinion, p. 195*).

If the master did, in fact, drive cattle overboard not for personal pecuniary profit, but for personal comfort and gratification (*Opinion, pp. 194, 195*), his conduct was barratrous, and the shipowners are relieved from responsibility by the exemption.

Barratry in a contract of carriage bears a different meaning than does the same word in a contract of insurance.

Carver's Carriage by Sea, 2d Edition, §§ 99, 100, pp. 107, 108, 109.

" ' Barratry ' or ' barratry of the master or mariners ' means
" any wilful act of spoliation or violence to the ship or goods,
" or any fraudulent or consciously illegal act which exposes
" the ship or goods to danger of damage, destruction or con-
" fiscation, done by the master or crew without the consent of
" the shipowner.

" For example, if goods are lost or damaged by the master
" wilfully running the ship upon rocks or attempting to scuttle
" her ; or through a fraudulent delay or deviation upon the voy-
" age for the master's private purposes ; or by the ship and
" cargo being fraudulently sold by the master ; the exception
" relieves the shipowner from responsibility for such losses.
" So, again, if the goods become confiscated owing to the mas-
" ter using the ship for purposes of smuggling, or trading with
" an enemy, or running a blockade. *And the effect is the same*
" *although the master was intending to act for the benefit of the*
" *owners.*"

Carver's Carriage by Sea, 2d Edition, § 99, pp. 107, 108.

(**c.**) If the immediate cause of loss is to be deemed an " accident of navigation," the shipowner is freed from liability,

even though such accident was remotely due to the negligence, default or error in judgment of the pilot, master or mariners of the ship.

Carver's Carriage by Sea, 2d Ed., § 101, p. 110.
The Duero, L. R., 2 Ad. & Ecc., 393 (1869).
Grill vs. General Iron Screw Collier Co., L. R., 1 C. P., 600 (1866).
The Cressington, L. R., 1 Prob., 152 (1891).

Tenth.

IT IS A MATTER OF PECULIAR INTEREST THAT THIS COURT SHOULD DECLARE THE EFFECT OF A CLAUSE WHICH PROVIDES THAT THE BILL OF LADING SHOULD BE GOVERNED BY A LAW OTHER THAN THE LAW OF THE PLACE OF ISSUE.

The question has arisen in numerous cases, but there is as yet no authoritative decision in any appellate tribunal.

The clause has been sustained as valid in the District Court of the United States for the District of Maryland.

The Oranmore, 24 Fed. Rep., 922.

It has been rejected as invalid in the District Court of the United States for the Southern District of New York, and in the District Court of the United States for the District of Massachusetts.

The Brantford City, 29 Fed. Rep., 373, 396.
The Guildhall, 58 Fed. Rep., 796.
The Iowa, 50 Fed. Rep., 561.

No appellate tribunal has passed upon the validity of the clause, and no certainty can be felt by the enormous commercial and shipping interests using bills of lading until the question has been adjudicated in this Court.

There is not involved any question as to abandoning the declarations of public policy already made by this Court respecting the exemption of a carrier from the consequences of his servants' negligence.

There is not involved even the question of a modification of such declarations, because of the provisions of the Harter Act.

27 U. S. Statutes at Large, p. 445.

There is not involved any question of introducing the law of a foreign country for the construction of the terms of contracts made and performed here.

The question is, whether a shipper and a shipowner may in contracting here for the transportation of cargo from this country to a foreign country, validly stipulate that any disputes or differences under the contract shall be determined by the law of the country where the shipment is to be delivered.

We submit that it is "reasonable and just in the eye of the "law" for the parties to agree to submit their rights to the law of the place where their relations will naturally terminate. If the Court holds that such a stipulation is "reasonable and just in the eye of the law," then the contract must be sustained, even though such foreign law does differ from the law of the United States.

Railroad Co. v. Lockwood, 17 Wall., 357, 380, 384.

No question has ever been raised in either pleadings or proofs as to the regularity of the clause in the bill of lading.

It was there properly, in accordance with the terms of the original memorandum contract, and, though it was fully pleaded by the respondent, there has been no suggestion by the libellants of irregularity or surprise.

The original contract made October 10th, in terms provided that a bill of lading should issue whose conditions should govern any questions not provided for in the contract (*Exh. 2, p. 133*). Pursuant to this contract the bill of lading was issued (*Exh. A, p. 136*). This bill was accepted by the libellants without question. When the libel was filed it was based upon the bill of lading (*Libel, Art. 1st., p. 2*), and there is no allegation in the libel, or any suggestion in the proofs, that the bill of lading was any different in form or in tenor than the libellants expected to receive under the terms of their contract.

The conditions of the bill of lading are pleaded in the answer of the respondent (*Ans., Art. 7, pp. 4, 5*).

In regular course the bill of lading was proved and testimony adduced to meet its several conditions.

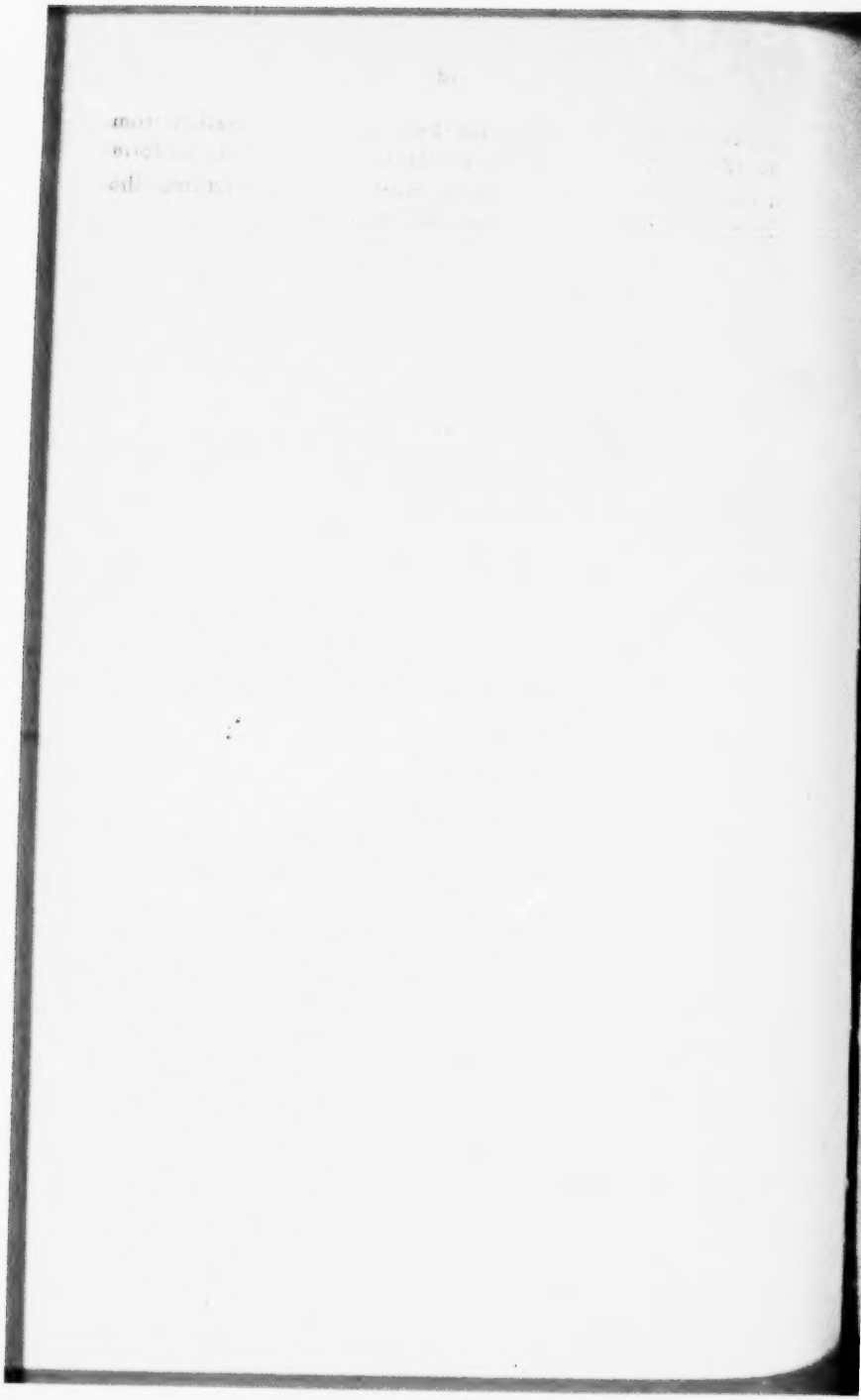
At no stage of the trial has there been any intimation from the libellants of irregularity or surprise in respect to the form or conditions of the bill of lading which they received from the steamer, and upon which their libel was founded.

Eleventh.

A MANDATE SHOULD ISSUE TO THE UNITED STATES CIRCUIT COURT OF APPEALS, DIRECTING THAT THE ORDER OF AFFIRMANCE MADE BY THEM MARCH 18TH, 1895, BE VACATED, AND THAT A NEW ORDER BE ENTERED REVERSING THE DECREE OF THE DISTRICT COURT, AND DIRECTING THE DISTRICT COURT TO DISMISS THE LIBEL AND TO DECREE THE PAYMENT BY THE LIBELLANTS TO THE OF THE COSTS OF ALL THE COURTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Appellant.

WILHELMUS MYNDERSE,
Advocate.



Office Supreme Court, U. S.
FILED,
APR 1 1895
JAMES H. McKENNEY,
CLERK

No. 39.

Filed 1895.

Supreme Court of the United States.

WILLIAM W. BRAUER ET AL.

against

COMPANHIA DE NAVEGACION LA FLECHA.

MEMORANDUM IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

MACFARLAND & PARKIN,
Proctors for Libellants.

W. W. MACFARLAND,
Of Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

WILLIAM W. BRAUER *et al.*

AGAINST

COMPANHIA DE NAVEGACION LA FLECHA.

MEMORANDUM IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

An application is made by the respondents for a writ of *certiorari* to the Circuit Court of Appeals to remove the record in the above entitled cause to this Court.

The suit is one in admiralty to recover for the loss of 126 cattle out of a total shipment of 165. The cattle were shipped in New York in October, 1891, by W. W. Brauer & Co., cattle dealers, of Richmond, Va. A storm was encountered and 126 of the cattle were thrown overboard. The libellants claimed that the cattle were alive and were unnecessarily sacrificed through fear on the part of the captain, and through bad management of his vessel. The respondents contended that in the storm nearly all the cattle were killed and maimed, and were thrown overboard because they had become worthless. Much testimony was taken. The Judge of the District Court decided that some at least were unnecessarily

sacrificed, and a reference was ordered (Record, fol. 750 *et seq*).

The Commissioner reviewed the whole testimony on the trial, and the further testimony before him, and awarded damages for one-half the cattle (Record, fol. 884 *et seq.*). Exceptions were filed by both parties. The report was modified as to some small items of expense, but confirmed as to the number of cattle for which the respondents should be held liable (Record, fol. 966 *et seq.*). Both parties appealed from the decree, but it was affirmed.

It is not believed that this Court will remove the record for the purpose of reviewing the question of fact as to which the District Court and Circuit Court of Appeals are in accord. However, as an examination of the facts is invited by the petitioner, we send herewith a copy of our brief in the Circuit Court of Appeals.

The petitioner claims, however, that there are certain propositions of law involved which should be passed upon by the Court.

I.—The petitioner claims that it is not liable for the voluntary destruction of the cattle, because under a provision of the bill of lading they were carried "on deck at owner's risk." The proposition is that not only did this provision protect the petitioner from sea perils, peculiar to carriage on deck; it went further and *gave the master a license to destroy cattle so carried without just cause.* Such, they say, is the interpretation of this provision; such the intention of the parties. It is obviously impossible to treat such a proposition seriously. Of course with the same force it might be argued that the mortality clause excused a wanton killing of the cattle.

It is hardly necessary to say that Benton & Co. *v.* English & Co., L. R., 12 Q. B. Div., 218, has no

bearing. In that case cargo was "necessarily jettisoned to save the ship and the rest of the cargo." It was held that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution. Moreover, we do not assent to the proposition that English law as exhibited in English decisions would not afford relief in such a case as this.

II.—The petitioner further claims that English law would not have given relief upon the facts in this case; that English law was imported into the contract, and should have been taken as the rule of decision.

(1.) The contract was made in New York between a citizen of the United States and a Spanish corporation for carriage of cattle from New York to Liverpool. The contract must therefore be governed by the law of the United States unless the clause referring it to English law is of force, and the law of the United States holds any clause exempting the carrier from liability for the negligence or misconduct of the master to be void as against public policy.

Liverpool S. S. Co. *v.* Phenix Ins. Co., 129 U. S., 397.

(2.) The provision that the contract should be governed by English law was not printed on the original bill of lading, but was stamped with a rubber stamp in type so small and indistinct that it was with difficulty found and read by the Judge on the trial. No assent to the clause on the part of the shipper can in such case be presumed.

Blossom *v.* Dodd, 43 N. Y., 264.
Madan *v.* Sherard, 73 N. Y., 330.
Perry *v.* Thompson, 98 Mass., 249.

The original bill of lading is submitted with this brief for inspection by this Court.

(3.) The clause is found only in the bill of lading. It did not form part of the original contract of affreightment.

Record, fols. 689 *et seq.*

The only reference to the bill of lading is in that clause of the contract which reads "the line form of live stock bill of lading to be used * * * and its conditions to govern any questions *not provided herein*" (fol. 696). The contract provided for the transportation of "about 165 live cattle on the upper deck" (fol. 690). "The shipper assumes all risk of mortality or accident, however caused, throughout the voyage." The contract undertakes to deal with the risk assumed by the shipper, and is not one of the "questions not provided therein." The English law, therefore, was not imported into the contract so far as the risk assumed by the shipper was concerned, and did not vary the extent of that risk as defined by the contract of affreightment and the law of the United States interpreting its provisions.

(4.) Any reference, however, to English law cannot be held to exempt the carrier in such a case from liability for his own negligence.

We do not take our rules of public policy from other countries, nor is it open to contracting parties to bring foreign rules here and make them grounds of decision in our own courts by stipulation in their contracts. Our courts will not enforce a contract which is against our public policy, even if made in another country and valid by its laws.

Oscanyon *v.* Arms Co., 103 U. S., 261.
Rouissilon *v.* Rouissilon, L. R., 14 Ch. Div., 351.

It could not make valid the clause exempting the carrier from liability for negligence to say in ex-

press terms that it should be deemed valid and enforced by any court before which it came, and to refer the contract for its interpretation and effect to the law of another country is simply to say the same thing in another form.

The Iowa, 50 Fed. Rep., 561.
The Energia, 56 Fed. Rep., 124.

MACFARLAND & PARKIN,
Proctors for Libellants.

W. W. MACFARLAND,
Of Counsel.

No. 249. 39.
Brief of MacFarland for Libellants.
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Supreme Court, U. S.
MAR 5 1897
CLERK

SUPREME COURT OF THE UNITED STATES.

Filed Mar. 5, 1897.

WILLIAM W. BRAUER ET AL.,
Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA,
Respondent.

BRIEF ON BEHALF OF LIBELLANTS.

MACFARLAND & PARKIN,
Proctors for Libellants.

W. W. MACFARLAND,
Of Counsel.

Supreme Court of the United States.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and the RELIANCE MARINE INSURANCE COMPANY, Limited,
Libellants,

AGAINST

COMPANIA de NAVEGACION LA FLECHA,
Respondent.

BRIEF ON BEHALF OF THE LIBELLANTS

Statement.

A "cattle contract" was signed on the 10th day of October, 1891, between H. Maitland Kersey, acting on behalf of the libellants, Brauer & Co., which is set out in the record at page 173, for the transportation of 165 head of live cattle from New York to Liverpool. The cattle were shipped and a bill of lading was signed on the 24th day of October (pp. 136, 137) on which day the ship sailed. The following brief narrative of subsequent events is taken from the testimony of respondent's witnesses in order that certain facts, perhaps not altogether irrelevant may appear without reference to conflicting evidence. Fine weather prevailed until the 30th of October, when the wind began to freshen, increasing somewhat on the 31st, when at 2.30 P. M. of that day, the ship was stopped and lay "*crosswise* to the wind and sea," in other words, in the trough of the sea; (pp. 46, 17, 32) in this position, the engineer says, "we were perfectly still" (p. 9). Down to this time the ship had pro-

ceeded at full speed (p. 11); there had been some slight structural damages to the cattle pens caused by the sea, but it was repaired, and at 5 P. M. of the 31st, the cattle were in their pens (pp. 60, 31, 32, 24, 21). But at that hour gangways were opened (p. 22), as the first officer says, "so that in case the sea should be worse the decks would be free to carry over the cattle" (p. 29), which were brought to the gangway (p. 35). Of the weather, at the time the decision to let the cattle go over was reached, the Captain says, "I could not tell whether the storm was coming on or not precisely" (p. 127). "At this time of the year you cannot appreciate exactly when a storm is coming on" (p. 128). At the time of opening the gangways for the cattle to go over they were uninjured" (pp, 46, 28, 29). One of the cattlemen in his testimony for the libellants says, that in order to get the cattle over, the crew cut their ropes and knocked down the pens (p. 73). It does not appear that the storm increased in severity the night of the 31st, as the Captain feared might be the case, and the next morning many cattle still remained on board, notwithstanding the opening of the gangways the night before, but many were injured from their treatment, of course; in fact the boatswain says, "the strength of the storm was from the 31st and the 30th." It is to be observed that the state of things in respect to the cattle, existing on the ship on the morning of the 1st of November was the direct and natural result of the Captain's deliberate purpose to destroy them and his efforts to that end the night before; a fact that Judge Wallace does not appear to take into account in his dissenting opinion. Reference to a few facts stated by the respondent's witnesses will show that the learned Judge somehow or other obtained a curiously erroneous idea of the state of the weather on the morning of November 1st. One circumstance demonstrates this. Among the crew was a boy named Enchortiata; (p. 43), that morning he fell overboard, he had on rubber clothing, and could not swim; sailors were able to stand on the rail and throw him a line a distance of some three fathoms, and the captain threw to him a life preserver from the bridge, and after being in the water some fifteen minutes he was hauled on board (pp. 43, 46; p. 19, fol. 76; p. 24, fols. 94, 95).

That morning the crew were able to perform all their usual duties, and by eleven o'clock the ship had been cleared of the cattle that had been condemned to the sea, and breakfast was served in the usual manner (fols. 77, 117, 167). Moreover, it is decisive on this point that the ship took in no water through the numerous openings, received no damage from the sea, nor does it appear any one of the many movable articles there must have been about the deck were even disturbed. Doubtless it might have been more or less difficult in the morning to distinguish cattle still in a condition to be saved from those that could not be, by reason of their injuries; but there was no intention, and therefore no attempt to do that, they had been all doomed the night before, consequently the respondent, rather than the libellants, should suffer from any obstacles in making proof thus occasioned. Nevertheless it is plain that the libellants were in fact prejudiced by the difficulties so created, but perhaps unavoidably under the circumstances. Certainly the respondent was not in a situation to complain on this point. Out of the whole number shipped all but 38 head of cattle were thus destroyed, with the exception of one lost by an accident. As to many details the witnesses for the respondent contradict themselves and each other, but as only questions of law are brought up, it would not be profitable to go into the evidence further than needful for an explanatory introduction, and for that purpose the main facts are presented in the above outline.

Argument.

I.—*The terms of the bill of lading.*

The only provisions of the bill of lading that can have any possible relevancy are the following (p. 136): (1) "On deck at owner's risk; steamer not to be held accountable for accident to or mortality of the animals from whatever cause arising;" (2) "the carrier shall not be liable for loss or damage occasioned by causes beyond his control;" (3) "by perils of the sea;" (4) "by accidents of navigation, even if occasioned by negligence." As to the first, it can only mean that the owner assumes the *normal* risks to which a deck cargo of that character is necessarily subject, and neither those words, nor those exempting the steamer from accident to or mortality of the cattle can be rationally held to exempt the steamer from liability for the destruction of the cattle by a wrongful jettison; that was not the "mortality" contemplated. As to the second, the word "carrier" here embraces the agents of the ship owner engaged in transportation, and it has been determined as matter of fact that the loss was not occasioned by causes beyond the carrier's control. The same may be said of the third, it having been established that the loss was not due to a peril of the sea. As to the fourth, it has been found and decided that the loss was not due to an "accident of navigation" but resulted from a wrongful jettison of cargo; and the word "*negligence*" refers only to *accidents of navigation* of which the words "collision" and "stranding" are given as types. The argument for the respondent, therefore, can find no support in any of the above provisions of the bill of lading, nor is understood to be founded upon them, but on the following clause, namely, "Also that this contract shall be governed by British law, with reference to which this contract is made." The position of this clause in the bill of lading is so pecaliar that the original bill of lading was sent up as part of the record. Upon inspection it will be seen to have been stamped on the paper as something extraneous and is so obscure as to be scarcely legible.

II.—*Relevancy of the reference to British law.*

The proposition of the respondent is, that if British law were to be taken as a rule of decision, the libellants could not recover because British law upholds stipulations in bills of lading to the effect that a carrier shall not be liable for *loss of cargo occasioned by the negligence of master or mariners.* Suppose that to be so, then the answer is, that as shown above, *there is no such stipulation in this bill of lading.* It will hardly be contended that British law *implies* such provisions in bills of lading or *proprio vigore* inserts them, as it were; therefore rules of English law applicable to provisions in a bill of lading which *are not* contained in the one in question, would not appear to be relevant.

III.—*The supposed doctrine of British law would not be a rule of decision here even if the terms of the bill of lading admitted of its application.*

If the above construction of the bill of lading is the true one, then what follows addresses itself, not to a real, but to an hypothetical case. Assuming that the contract contains words of exemption from liability, which it is submitted it does not contain, the argument for the respondent is, that the reference to "British law" incorporated all decisions of English Courts expounding that law that had been or might be made. That such was the deliberate and real *intention of* the parties, of course could not be argued, for the idea is altogether absurd, and it must, therefore, be maintained, that without regard to intention or volition the clause must not only be regarded as valid and binding, but receive the widest and most liberal interpretation in favor of the respondent. While it appears to be conceded that a provision in a bill of lading in express terms exempting the ship owner from liability for the wrongful sacrifice of cargo, would be obnoxions to our law and treated as void, it is said it may be expressed, as it were, in cypher, by reference to the whole

body of a foreign law, as interpreted by foreign judicial decisions, and thus concealed may in case of need (to use an expression of photography) be developed, and that it must then be adopted as a rule of decision, because the foreign law would hold it to be valid. To argue against such a proposition would be idle and profitless, the fallacy is obvious, and this device for evading our law has been almost uniformly denounced in judicial decisions, and rightly, for the question is not as to a form of words and patent or latent meaning, but as to *the validity of the stipulation they are alleged to express.*

The *Energia*, 56 Fed. Rep , 124.
Lewisohn *v.* Natl. S. S. Co., 56 Eed. Rep., 602.
Monroe *v.* The *Iowa*, 50 Fed. Rep., 561.
The *Brantford City*, 29 Fed. Rep., 373.
Tne *Guildhall*, 58 Fed. Rep., 796.

That foreign law is allowed extra territorial force only *ex comitate* is a truism, as is also the proposition that no rule of foreign law will be adopted and enforced which is contrary to the public policy of the *lex fori*. If the rule of exemption invoked by the respondent had been expressed in the contract in terms, it must have been pronounced void on the authority of Liverpool, etc.,S. S. Co. *v.* Phœnix Ins. Co., 129 U. S., 397. It is none the less void when deduced from the decisions of a foreign court and set np as a defense. The decision in the case last mentioned settled once for all the questions raised by the argument for the respondent. The contract is governed by our law, which pronounces stipulations in a bill of lading exempting carriers by sea from liability for the negligence or misconduct of masters or mariners to be void. It is truly said in effect that such provisions must be held to have been extorted under duress of circumstances by the carrier whose *quasi* public function imposes common law obligations against the due performance of which he may not contract.

IV.—*The Harter Act.*

It is unnecessary to say that this case must be decided according to the law existing at the date of the contract. But while this self-evident proposition is not denied the above act is referred to as tending to show that the pre-existing law in the premises, as defined in judicial decisions, was regarded as too strict. But this Court has pointed out in the case of the *Delaware* (161 U. S., at p. 470 *et seq.*), that directly the reverse is true. It is there shown that the exactions of carriers by sea expressed in their bills of lading had become intolerable. That the object of the act was to provide a remedy which is to be found in the stern provisions of the first section.

In respect to the object of the act the Court says among other things :

"It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her *cargo*. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between *the cargo and the vessel*, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and *the care and delivery of the cargo*."

It is further said in the argument for the respondent that the act provides that Sections 1 and 4 shall not apply "to the transportation of live animals." But all that can be said of this exception is that it leaves the law in regard to the transportation of live animals as it was before, and thus excludes any favorable inference from the act, which the respondent mistakenly supposes it to afford.

Finally, judgment should be affirmed.

W. W. MacFARLAND,
Of Counsel.

39

SUPREME COURT OF THE UNITED STATES

WILLIAM W. BRAUER ET AL.,
Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA,
Respondent.

MOTION FOR ALLOWANCE OF INTEREST ON THE DECREE OF THE DISTRICT COURT.

W. W. MacFARLAND,
Proctor for Libellants.

United States Supreme Court.

WILLIAM W. BRAUER *et al.*

AGAINST

COMPANIA DE NAVIGACION LA FLECHA.

SIRS:

Please take notice that the annexed petition will be submitted to the Supreme Court of the United States on Monday, December 13, 1897, at the opening of Court on that day.

Dated N. Y., December 8, 1897.

Yours, &c.,

WILLIAM W. MACFARLAND,
Proctor for Libellants.

To Messrs. BUTLER, STILLMAN & HUBBARD,
Proctors for Respondent,
54 Wall Street,
N. Y. City.

Due service of the foregoing notice and of the petition therein referred to is hereby admitted.

WILHELMUS MYNDERSE,
Proctor for Compania de Navigacion La Flecha.

4 UNITED STATES SUPREME COURT.

WILLIAM W. BRAUER *et al.*

AGAINST

COMPANIA DE NAVIGACION LA FLECHA.

TO THE SUPREME COURT OF THE UNITED STATES:

5 The petition of the above named libellants respectfully shows as follows:

This action was brought in the United States District Court for the Southern District of New York, sitting in Admiralty, to recover for 126 head of cattle thrown overboard from the steamship *Hugo*. The District Court found that 63 of the cattle had been unnecessarily thrown overboard, and awarded to the libellants $6,839.54 for the loss of said cattle, together with costs, a decree being entered for $7,104.32, on May 7, 1894. Both parties appealed to the United States Circuit Court of Appeals, where the decree of the District Court was affirmed, on March 18, 1895. Thereupon the respondent applied to this Court for a writ of *certiorari* to remove the cause to this Court,
6 which application was granted, and the libellants were thereby stayed from collecting the amount awarded them for the loss of the cattle.

Your petitioner further shows that on or about October 27, 1897, this Court rendered a decision affirming the decree of the United States Circuit Court of Appeals, with costs. Nothing is said in the opinion in regard to interest on the decree of the Court below, and the mandate which has been issued does not award interest, and your petitioners are advised that although by the action of the respondents in suing out said writ of *certiorari* your petitioners have been prevented and delayed in collecting the amount awarded them, nevertheless no interest can

be recovered thereon unless the decree of this Court and 7
the mandate issued thereon be amended by specifically awarding interest. The amount of such interest, calculated from the date of the decree in the District Court, exceeds $1,500. The mandate of this Court has not yet been filed in the District Court, but is returned herewith.

Your petitioners show that it is a great hardship that they should be deprived of all interest on the amount awarded to them, and in this connection your petitioners beg leave to refer to the bond given by the respondents at the commencement of this action, whereby they stipulated to pay any judgment that might be recovered in said action, "in said Court or in any appellate court, together with all costs and interest."

Your petitioners are advised that it was in the contem- 8
plation of the parties in giving said bond that interest would follow upon any decree that might be recovered in the action.

Wherefore, your petitioners pray that the decree herein may be amended by the allowance of interest to your petitioner, and that a mandate may be issued accordingly.

WILLIAM W. MACFARLAND.
Advocate.

UNITED STATES SUPREME COURT.

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WILLIAM W. BRAUER *et al.*

AGAINST

COMPANIA DE NAVIGACION LA FLECHA.

Memorandum in support of the motion for an allowance of interest upon the decree of the District Court.

The respondents by the terms of the bond which they gave at the commencement of this action, stipulated to

10 pay any judgment that might be recovered in said action in "said District Court or in *any appellate court*." In view of this stipulation it was thought not to be necessary to ask the Circuit Court of Appeals to include a provision for interest in its decree of affirmance, for it was assumed that interest would follow as matter of course.

No reference was made to the subject in this Court for the same reason, but perhaps it was an oversight not to call the attention of the Court to the question of interest.

The whole case being here, it is for this Court to say what in this respect justice requires.

It can only be respectfully submitted:

1. That it would appear to be just that the decree should give effect to the express stipulation for the pay-
11 ment of interest, and—

2. That as by the decree of the District Court now affirmed, a specific sum was found due to the libellant which was not paid, but withheld pending the appeals, and presumably employed productively, it would seem to be only right and just that interest should be allowed for its detention.

It is true that both parties appeal to the Circuit Court of Appeals from the decree of the District Court. The respondent because it denied all liability; the libellants because they thought the amount allowed was too small, but this fact of the two appeals would not appear to have
12 any bearing upon the right of the libellants to interest upon the sum originally decreed to be due to them.

W. W. MacFarland,
Advocate for Libellants.

Supreme Court of the United States.

WILLIAM W. BRAUER and others,
Libellants,

AGAINST

COMPANIA DE NAVIGACION LA FLECHA.

No. 39.

Brief in opposition to Motion to amend Mandate in respect of Interest.

This action was originally instituted by the libellants in the District Court of the United States for the Southern District of New York, March 25, 1892, to recover the value of 126 cattle lost on a voyage between New York and Liverpool (*Record, p. 4*).

The District Court gave the libellants a decree May 7, 1894, for the value of 63 of such cattle, with interest thereon to the date of the decree, and with costs, the entire decree being $7,104.32 (*Record, pp. 183, 184*).

Both parties appealed from such decree to the United States Circuit Court of Appeals (*Record, pp. 184, 185*).

The Circuit Court of Appeals affirmed the decree of the District Court, and entered an order March 18, 1895, as follows :

" Ordered, that the decree so appealed from be, and the " same hereby is, affirmed without costs in this court to either " party ; and ordered, that a mandate issue accordingly forth- " with," etc., etc. (*Record, pp. 196, 197*).

The rules of the United States Circuit Court of Appeals provide in respect of interest upon affirmance of decrees of lower Courts :

" In cases in admiralty, damages and interest may be allowed " if specially directed by the Court " (*Rule 30, Subdiv. 4*).

In entering the order of affirmance no allowance of interest was directed by the Circuit Court of Appeals, and, therefore, none would run.

The omission to direct the allowance of interest was in accord with the usual practice of the Circuit Court of Appeals in cases where both parties are appellants. They say, in one case, specifically:

> " The decree of the District Court is affirmed, but, *as both sides appealed*, without interest or costs."
>
> *British & Foreign vs. Southern Pac., 72 Fed. Rep. 285, 288.*

The discretion of the Circuit Court of Appeals under their Rule 30, Subdivision 4, was exercised, and properly exercised, in disallowing interest pending the hearing in that Court of the appeals taken by both parties.

The Supreme Court has a rule identical in terms with that of the United States Circuit Court of Appeals.

> *Rule 23, Subdiv. 4, as amended March 10, 1890, 133 U. S., 711, Appendix.*

Under that rule interest is ordinarily purely within the discretion of the Court to allow or disallow interest.

In the case under consideration, however, this Court has affirmed an order of the Circuit Court of Appeals, which order did not allow interest. It seems probable, therefore, that this Court has not felt that, under the peculiar circumstances of the case, the usual discretion rested with it.

If it has discretion in respect of interest, it has apparently been exercised in favor of disallowing interest—a result which is fairly justified by the hard situation of the shipowner.

In no event should the allowance of interest extend further back than March 18, 1895, the date of the order of the Circuit Court of Appeals.

WILHELMUS MYNDERSE,
Proctor for Compania de Navigacion.

COMPANIA DE NAVIGACION LA FLECHA *v.* BRAUER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 39. Argued March 29, 30, 1897. — Decided October 28, 1897.

A contract, made at New York to carry cattle on deck of a steamboat from New York to Liverpool, contained these provisions: "On deck at owner's risk, steamer not to be held accountable for accident to, or mortality of, the animals, from whatever cause arising." "The carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters;" "by barratry of the master or crew;" "by collisions, stranding or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner." *Held*, that by the terms of this contract, whether governed by the law of this country or by the law of England, the carrier was not exempted from responsibility for the loss of sound cattle, forcibly thrown or driven overboard, in rough weather, by order of the master, from unfounded apprehension on his part, in the absence of any pressing peril to the ship, and with no apparent or reasonable necessity for a jettison of the sound cattle, and no attempt to separate them from those which had already been injured by perils of the sea.

THIS was a libel in admiralty in the District Court of the United States for the Southern District of New York by William W. Brauer and Frederick C. Brauer, residing and doing business as partners under the name of William W. Brauer & Company at Richmond in the State of Virginia, and by the Reliance Marine Insurance Company, Limited, of Liverpool, a corporation organized under the laws of Great Britain, against the Compania de Navigacion la Flecha, a corporation organized under the laws of Spain, and owner of the steamship Hugo, to recover for the loss of cattle shipped by the partnership October 24, 1891, on deck of the Hugo at New York for Liverpool under a bill of lading, the material parts of which are copied in the margin, the parts there

printed in ordinary type being in print, and those in italics being in writing, in the original.[1]

The libel alleged that the vessel, having one hundred and

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[1] Received in apparent good order and condition, by the *Spanish steamer Hugo*, from *Wm. W. Brauer & Co.*, to be transported by the good steamship *Hugo*, now lying in the port of New York, and bound for *Liverpool, one hundred and sixty-five live cattle on deck. On deck at owner's risk, steamer not to be held accountable for accident to, or mortality of, the animals, from whatever cause arising;* being marked and numbered as per margin (weight, quality, contents and value unknown), and to be delivered in like good order and condition at the port of *Liverpool* (or so near thereto as she may safely get) unto *shippers' order* or to his or their assigns. *Freight prepaid in New York.* General average payable according to York-Antwerp rules.

It is mutually agreed that the ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters; by fire from any cause and wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; by arrest and restraint of princes, rulers or people, riots, strikes or stoppage of labor; by explosion, bursting of boilers, breakage of shaft, or any latent defect in hull or machinery, or appurtenances; by collisions, stranding, or other accidents of navigation, of whatsoever kind, (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager); nor by decay, heating, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, or numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage.

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14. Also, that this contract shall be governed by British law, with reference to which law this contract is made.

And, finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written

sixty-five head of live cattle on board, sailed for the port of Liverpool on October 24, 1891; that "about October 31, 1891, the said vessel having encountered some rough weather, the master and crew of said vessel became panic stricken, and drove overboard one hundred and twenty-six head of cattle; the said vessel did not incur any extraordinary or unusual stress of weather, and the act of said master and crew in driving overboard said cattle was wholly unnecessary, and the loss of said cattle was due to the incompetency and lack of skill of the master and crew;" that the vessel afterwards arrived safely at Liverpool, and delivered to the shippers or their agents thirty-eight of the cattle in good condition, one having died; and that the insurance company, having insured the cattle, paid the partnership for the loss, and took an assignment of its rights of action against the steamer and her owners.

The answer alleged that the receipt, transportation and delivery of the cattle were subject to the terms and conditions of a contract between the shippers and the respondents, dated October 10, 1891, (which is copied in the margin,[1]) and of the

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or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

[1] White Star Line. Cattle contract — Memorandum of agreement concluded at New York the tenth day of October, 1891, between H. Maitland Kersey, agent of the Spanish steamer Hugo, and Messrs. William H. Brauer & Co., of Richmond, Virginia.

The agent agrees to let to the said shipper suitable space, as undernoted, for the transportation of live cattle; this is to say:

On the steamer Hugo, intended to sail from New York about Oct. 24th, 1891, for Liverpool, England.

For about one hundred sixty live cattle on the upper deck.

No other cattle to be carried this voyage.

The shipper agrees to ship all the cattle, as above mentioned, at the rate of fifty shillings, British sterling, for each animal shipped on open decks.

The shipper especially agrees to prepay freight on the above mentioned shipments on date of sailing, in current funds at the rate for which prime bankers are selling sight bills on London, on the number of cattle shipped at New York, vessel lost or not lost, and irrespective of the number landed at the port of destination, and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage.

bill of lading; admitted the sailing of the vessel with the cattle on board, and a loss of the cattle; denied the other allegations of the libel; and contained the following averments:

Stalls to be put up at ship's expense, and to be constructed to the satisfaction of the inspector or underwriters interested, and to the satisfaction of shipper, who will assume all responsibility for same, and for the various appliances for ventilation after shipment of cattle.

The steamer undertakes to supply sufficient good condensed or fresh water for the use of the animals during the voyage; also, water casks and hose.

Steamer to provide space, free of charge, for corn and strictly compressed fodder for animals, but freight, if demanded, shall be payable on any unusual excess of fodder landed at port of destination. If fodder be supplied that is not strictly compressed, a proportionate quantity may be carried on deck.

Steamer to supply suitable gangways and elevators for loading cattle.

Steamer to give free passage, over and back, and to supply bedding to drovers in charge of animals, (not exceeding one man to every thirty cattle,) and if not returning direct to port of sailing, to provide free intermediate passage back for foreman, and free steerage passage back for other attendants, by first available steamer of this line.

Steamer to give six running days' notice of her intended departure, and twelve hours' notice of the hour the cattle must be delivered to her, but such notices to be given or received are subject to become inoperative in case of strike or stoppage of labor.

Steamer guarantees to sail as soon after shipment of all the animals as tide and weather permit, or pay expenses of keep of animals at the rate of 50c. per head per day in full.

Steamer has privilege of exceeding her net register tonnage in grain, upon payment to shippers the extra premium charged by the underwriters with whom the animals are insured.

Shippers to deliver the cattle to the vessel between sunrise and sunset, at the dock or in the stream, at their option.

Shippers guarantee to deliver animals by expiry of notice, provided vessel is ready for them, or to pay for detention of steamer at the rate of £50 per day.

In case of non-arrival of vessel in time to sail from New York on or before November 4, 1891, shipper has option of cancellation.

The line form of live stock bill of lading to be used for cattle shipped under this contract, and its conditions to govern any questions not provided herein, subject to U. S. Government inspection.

Any dispute arising under this contract to be settled by arbitration in the usual way.

Dated New York, October 10th, 1891.

H. MAITLAND KERSEY.
WM. W. BRAUER & CO.

Statement of the Case.

"Further answering the said libel, the respondent avers that by the terms and conditions of the contract and bill of lading, under which the said cattle were received for transportation and delivery, it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond his control, by the perils of the seas or other waters, or by other accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the master, mariners or other servants of the shipowner, and that the cattle were carried on deck at the owner's risk, and under a special provision that the steamer should not be held accountable for accident to or mortality of the animals from whatsoever cause arising. There was a further provision that the contract should be construed and governed by the law as administered in the courts of Great Britain, with reference to which law the contract was stated to be and was made.

"And the respondent avers that the loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattle-houses and set the cattle adrift, and that during the continuance of the perils, and by reason thereof, certain of the cattle were washed overboard, and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or hopeless condition, and that upon such being taken to the gangways, they were washed over by the seas."

"And the respondent avers that the care given to said cattle was according to the best judgment of the master of said steamer, and that, if he erred in his judgment or was in any degree negligent, which the respondent denies, still this respondent is absolved from accountability and responsibility by reason of the terms of the bill of lading; and also that, by the law as administered in the courts of Great Britain, the respondent, being itself without fault, is validly, under the terms of the said contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of the master, mariners or other servants of the respondent."

It was stipulated by counsel "that the English judicial

decisions, as contained in the printed decisions of the law or admiralty courts, may be referred to by either party as evidence of the English common or maritime law as administered in the English courts."

The conclusions of fact of the District Judge were summed up in his opinion as follows:

"During three days from October 30 to November 1, inclusive, the vessel met heavy weather, during which there was heavy rolling of the vessel. The cattle were in pens on deck; a few forward under and near the turtle-back, which were saved; the rest were in the vicinity of Nos. 3 and 4 hatches, forward and aft of the engine room, in pens built in the wings on the port and starboard sides of the ship, all of which were lost. The storm was heaviest on the afternoon and night of Saturday the 31st, the wind and seas coming first and heaviest from the northwest, but on Saturday hauling to the northward and to east northeast, with cross seas. Some slight damage was done to a few pens on the 30th; more were broken on Saturday the 31st, but these were repaired and the cattle put in place toward nightfall. About 5 o'clock on that day the after gangways were opened on each side, and about ten or twelve cattle that had become maimed and helpless were sent overboard through those gangways. The chief loss was during that night and the following morning, when, shortly after daylight, the captain gave orders to open the forward gangways also, and the whole deck was cleared of all the cattle save the thirty-nine under the turtle-back."

"Upon the whole testimony in this pitiful case, I am not disposed to pronounce any unfavorable judgment upon the handling of the ship by the master. His record as a master appears to have been good, and on any doubtful question of navigation he is entitled to the benefit of his record. He had some, though not large, experience in the transportation of cattle; and the experts called by each party place so much stress upon the special circumstances of the situation, the quality of the ship, and the necessary determination of the master's own judgment at the time, that in the circumstances

testified to I do not find any conclusive proof adverse to the master's judgment as to the navigation of the ship.

"The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were not maimed or substantially hurt was made on the morning of Sunday, the 1st of November, not from any pressing necessity, but solely from mere apprehension; and I am further persuaded that there was no reasonable or apparent necessity for the sacrifice. It was morning. The night was past. No one testifies to any pressing peril to the ship. The log does not hint of it. No reason appears why such cattle as could go about, and were actually going about, should not have been cared for and preserved. There was plainly no effort made to separate the sound from the maimed. Even the master says, in answer to the question, 'Were these cattle standing up that went overboard? Ans. They were down. Some may have been up; I don't know.' His object plainly was to clear the deck of all the cattle from No. 3 aft, with no attempt to discriminate or save any. His state of mind is shown by his concluding words: 'We all breathed happily when we saw it open' (No. 3 hatch)."

The District Judge was of opinion that the stipulations of the bill of lading, so far as they undertook to exempt the respondent from accountability for the negligence of the master or crew, though valid by the law of England, were invalid by our law; and therefore decreed "that the libellants recover damages for such of the oxen as were of any market value and not fatally wounded or maimed at the time when the houses and cleats provided for them were designedly torn up, and which oxen were cast overboard or negligently suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous;" and referred the case to a commissioner to ascertain and report the amount of such damage. 57 Fed. Rep. 403.

The commissioner reported that sixty-three of the cattle were thus voluntarily and unnecessarily sacrificed, and assessed damages for that number of cattle. The District Court confirmed his report, and entered a decree accordingly for the libellants. 61 Fed. Rep. 860.

Argument for Compania la Flecha.

Both parties appealed to the Circuit Court of Appeals, which adopted the conclusions of fact of the District Court, and affirmed the decree upon the ground that the case was not within the exceptions in the bill of lading. 35 U. S. App. 44.

The respondent applied for and obtained a writ of certiorari from this court.

Mr. Wilhelmus Mynderse for Compania de Navigacion la Flecha.

The action is prosecuted in the courts of the United States in attempted evasion of the agreement "that the contract shall be governed by British law."

The libellants, attracted apparently by the decision in the case of the *Brantford City*, 29 Fed. Rep. 373, have sought to build a similar case against the respondent, and have come far out of their way to bring suit in the same jurisdiction. Liverpool was the port of destination. It was there that the Insurance Company, the principal libellant herein, and the only libellant that profits by the decree, had its principal offices, and it was there that the claim should have been presented and pressed, if presented and pressed at all. Apparently no claim was presented there. But six months later the Insurance Company came to New York and instituted this suit.

The libellants did not make proper provision for the cattle.

The storm encountered by the Hugo was one of notable severity, and the losses of the cattle were due to the perils incident to the storm. The steamer itself was intelligently and prudently managed and navigated during the time of it, and the courts below were in error as to the facts.

The bill of lading provides that "this contract shall be governed by the British law," with reference to which law the contract was made.

In *Liverpool Steamship Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, this court said (page 458): "The review of the principal cases demonstrates that according to the great preponderance,

if not the uniform concurrence, of authority, the general rule that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

The court held in that case that there was nothing to indicate that the contracting parties looked to any other law than the law of the United States.

In the case under consideration, however, it is apparent that the parties did look to the law of England; that they deliberately chose it; that it was not an exaction from a shipper by a carrier, but that it was in accord with a preliminary contract, freely made and unobjected to. The cattle were destined to an English port. It was fitting that reference should be made to the law of that port. Any differences between shippers and shipowners would naturally be submitted to the law of the place where their relations terminated. Moreover, the Reliance Marine Insurance Company, which represents the entire interest of the libellants, is a British corporation having its principal office in Liverpool, the port of the Hugo's destination.

The validity of the provisions of the bill of lading should be determined by the standard of what is just and reasonable in the eye of the law. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 380, 382. It is just and reasonable to apply the British law, the law of the port of destination.

The District Judge declined to enforce the English law, upon the ground that the stipulation in the bill of lading providing for the application of the British law was invalid as against the public policy of the United States. A similar provision has, however, been sustained in the District Court of Maryland. *The Oranmore*, 24 Fed. Rep. 922, 927. The United States Circuit Court of Appeals avoided any discus-

sion of the application of the British law, disregarding certain of the exemption clauses, and holding in respect to others that the facts did not render the question of applying the British law material.

The provision in the bill of lading that the contract be governed by British law is not invalid.

It cannot be fairly said that there is a question in the case whether or not it is against the public policy of this country to permit a carrier by sea to exempt himself from the consequences of his servants' negligence or error. The real question is whether it is against the public policy of this country to permit shipowner and shipper to agree in New York that their contract for a shipment of cattle from New York to England shall be construed according to the place where the final performance of the contract takes place and where, if anywhere, differences as to the performance by the carrier of his engagements would naturally arise.

It is especially proper that where a contract relates to transportation on the high seas from one nation to another, the entire transaction not being under the jurisdiction of any one nation, the parties shall declare in their contract the jurisdiction by the laws of which they intend their contract to be governed.

With such declaration made, it is against public policy and against commercial integrity to permit either party, and especially the party with whom the right to select the forum rests, to insist that the law of the forum, and not the law stipulated in the contract, should be applied to the construction of the contract.

It has been said by this court that it is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 378. The rule has been extended from the strict obligations resting upon a carrier by land, to cover those of a carrier by sea. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

At the time this latter decision was made there was no legislative distinction between the obligations and rights of a

carrier by sea and of a carrier by land. Nor, indeed, was there any such distinction at the time these cattle were shipped upon the Hugo. But Congress, with whom certainly rests the right to declare the public policy of a country, have since that date passed an act, known as the Harter Act, which provides in terms that: "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors of navigation, or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters," etc. Act of February 13, 1893, c. 105, 27 Stat. 445.

If this loss had occurred subsequent to July 1, 1893, there would have been no recovery for the libellants under the laws of the United States.

Prior to July 1, 1893, there could be no recovery for the libellants according to the laws of Great Britain, and to those laws they should be remitted.

But if this court will not reëxamine the facts, and accepts the facts as found by a majority of the Judges of the Circuit Court of Appeals, still no liability rests upon the shipowner for the loss of libellants' cattle under the contract of shipment, such contract being governed by the law of Great Britain.

It was recited in the bill of lading that the cattle were shipped "on deck at owner's risk." That such a provision should be made respecting a shipment of live animals to be transported on the deck of a freight steamer across the Atlantic, at a tempestuous season of the year, was eminently proper, and due allowance for the risks assumed by the owner of the cattle was undoubtedly made in the rate of freight at which the cattle were accepted for carriage.

In the case of *Burton* v. *English*, 12 Q. B. D. 218, a similar

clause, "The steamer shall be provided with a deck cargo, if required at full freight, but at merchant's risk," was considered by the Judges of the Court of Appeal, who substantially held that it relieved the shipowner from all responsibility for the acts of his servants, except responsibility to contribute in general average in case of lawful jettison or other lawful sacrifice.

Brett, M. R., said: "It is obvious that this is a stipulation in favor of the shipowners, for, in order to earn a larger freight, they may require part of the cargo to be deck cargo, and then it is to be at the merchant's risk. My brother Cave, who delivered the judgment of the Divisional Court, held that this stipulation absolved the shipowners from liability to contribute to general average. It must be admitted that if there were an *improper jettison* by the master and crew, this stipulation would relieve the shipowners from liability. . . . If the liability is in consequence of any act of any of his servants for which the shipowner would be liable but for this stipulation, then it follows that the defendants are freed from liability. I should say that this stipulation would cover any act of the master or crew, which being done by them as servants of the shipowner would otherwise make him liable; it therefore covers the case of improper jettison, also a loss caused by a collision or stranding owing to the negligence of the master or crew."

Bowen, L. J., said, respecting the clause: "Now, that clearly is a stipulation in favor of the shipowners, and *prima facie* it seems to me meant to relieve them from the responsibility of some act of their servants by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage. It would, I think, clearly cover improper jettison, also it would cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible."

Baggallay, L. J., concurred in the view of Justices Brett and Bowen. See, also, *Lewis* v. *Great Western Railway*, L. R.

3 Q. B. D. 195; *McCauley* v. *Furness Railway*, L. R. 8 Q. B. 57.

If the immediate cause of loss is to be deemed an accident of navigation, the shipowner is freed from liability, even though such accident was remotely due to the negligence, default or error in judgment of the pilot, master or mariners of the ship. Carver's Carriage by Sea, 2d ed. § 101, p. 110; *The Duero*, L. R. 2 Ad. & Ec. 393 (1869); *Grill* v. *General Iron Screw Colliery Co.*, L. R. 1. C. P. 600 (1866); *The Cressington*, (1891,) Prob. 152.

Finally, it is a matter of peculiar interest that this court should declare the effect of a clause which provides that the bill of lading should be governed by a law other than the law of the place of issue.

The question has arisen in numerous cases, but there is as yet no authoritative decision in any appellate tribunal.

The clause has been sustained as valid in the District Court of the United States for the District of Maryland. *The Oranmore*, 24 Fed. Rep. 922. It has been rejected as invalid in the District Court of the United States for the Southern District of New York, and in the District Court of the United States for the District of Massachusetts. *The Brantford City*, 29 Fed. Rep. 373, 396; *The Guildhall*, 58 Fed. Rep. 796; *The Iowa*, 50 Fed. Rep. 561.

No appellate tribunal has passed upon the validity of the clause, and no certainty can be felt by the enormous commercial and shipping interests using bills of lading until the question has been adjudicated in this court.

There is not involved any question as to abandoning the declarations of public policy already made by this court respecting the exemption of a carrier from the consequences of his servants' negligence.

There is not involved even the question of a modification of such declarations, because of the provisions of the Harter Act.

There is not involved any question of introducing the law of a foreign country for the construction of the terms of contracts made and performed here.

The question is, whether a shipper and a shipowner may in

contracting here for the transportation of cargo from this country to a foreign country, validly stipulate that any disputes or differences under the contract shall be determined by the law of the country where the shipment is to be delivered.

We submit that it is "reasonable and just in the eye of the law" for the parties to agree to submit their rights to the law of the place where their relations will naturally terminate. If the court holds that such a stipulation is "reasonable and just in the eye of the law," then the contract must be sustained, even though such foreign law does differ from the law of the United States. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 380, 384.

Mr. W. W. MacFarland for Brauer and others.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The contract sued on was made in October, 1891, more than a year before the passage of the Harter Act, and the case is unaffected by its provisions. Act of February 13, 1893, c. 105; 27 Stat. 445.

By the law of this country, before that act, as declared upon much consideration by this court, common carriers, by land or sea, could not, by any form of contract with the owner of property carried, exempt themselves from responsibility for loss or damage arising from negligence of their own servants; and any stipulation for such exemption was contrary to public policy and void. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

By the modern decisions in England, on the other hand, made since it has become to us a foreign country, common carriers, except so far as controlled by the provisions of the Railway and Canal Traffic Act of 1854, were permitted to exempt themselves by express contract for responsibility for losses occasioned by negligence of their servants. *Peck* v. *North Staffordshire Railway*, 10 H. L. Cas. 473, 493, 494;

Steel v. *State Line Steamship Co.*, 3 App. Cas. 72; *Manchester &c. Railway* v. *Brown*, 8 App. Cas. 703; *In re Missouri Steamship Co.*, 42 Ch. D. 321; *The Cressington*, (1891) Prob. 152.

In the case at bar, the decision of the District Judge proceeded upon the ground that any stipulation directly exempting the carrier from all liability for negligence of his servants being void by our law as against public policy, the equivalent stipulation that the contract should be governed by the law of England was equally void, and could not be enforced in the courts of the United States. That decision is in accordance with the previous decision of the same judge in *The Brantford City*, 29 Fed. Rep. 373, and with several subsequent decisions of his. *The Energia*, 56 Fed. Rep. 124; *The Guildhall*, 58 Fed. Rep. 796; *Botany Mills* v. *Knott*, 76 Fed. Rep. 582. The like view has been taken by Judge Nelson in the District of Massachusetts in *The Iowa*, 50 Fed. Rep. 561; by Judge Benedict in the Eastern District of New York in *Lewisohn* v. *National Steamship Co.*, 56 Fed. Rep. 602; and by Judge Butler in the Eastern District of Pennsylvania in *The Glenmavis*, 69 Fed. Rep. 472. See also *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Hamlyn* v. *Talisker Distillery*, (1894) App. Cas. 202, 209, 214; *Rousillon* v. *Rousillon*, 14 Ch. Div. 351, 369.

But it is unnecessary to express a decisive opinion upon the validity of the contract, because, assuming it to be valid and to govern the case, this court concurs with the Circuit Court of Appeals in the opinion that the respondent was liable for the loss in question.

Exceptions in a bill of lading or charter party, inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him. *The Caledonia*, 157 U. S. 124, 137; *The Majestic*, 166 U. S. 375, 386; *Norman* v. *Binnington*, 25 Q. B. D. 475, 477; *Baerselman* v. *Bailey*, (1895) 2 Q. B. 301, 305.

By the laws of both countries, the ordinary contract of a common carrier by sea involves an obligation on his part to use due care and skill in navigating the vessel and in carrying the goods; and an exception, in the bill of lading, of perils

of the sea, or other specified perils, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed.

This rule of construction was fully established in this court before it had occasion to decide the question whether it was within the power of the carrier by express stipulation to exempt himself from all responsibility for the negligence of himself or his servants.

In the leading case of *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, a crate of William F. Harnden, in which was money belonging to the bank, was shipped upon a steamboat of the navigation company under an agreement stipulating that "the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden, and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner in the boats of the said company." This court held that the navigation company was not thereby exonerated from loss by fire arising from the negligence of that company or its servants; and the reasons for the decision were stated by Mr. Justice Nelson as follows: "The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risks incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." "If it is competent at all for the carrier to

stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties." 6 How. 383, 384. See also *The Hornet*, 17 How. 100; *Transportation Co.* v. *Downer*, 11 Wall. 129; *The Syracuse*, 12 Wall. 167; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438.

In England, likewise, it has long been recognized as a settled rule that under a contract to carry goods, containing an exception such as of "breakage or leakage," or of "barratry of the master or mariners," or of "perils of the sea," there still rests upon the carrier, not merely the duty to carry the goods if not prevented by the excepted perils, but also the obligation that he and his servants shall use due care and skill and shall not be negligent in carrying the goods. *Phillips* v. *Clark*, 2 C. B. (N. S.) 156; *The Helene*, L. R. 1 P. C. 231; *Lloyd* v. *The General Iron Screw Colliery Co.*, 3 H. & C. 284; *Grill* v. *Same*, L. R. 1 C. P. 600, and L. R. 3 C. P. 476; *Czech* v. *General Steam Navigation Co.*, L. R. 3 C. P. 14; *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 87, 88; *Manchester &c. Railway* v. *Brown*, 8 App. Cas. 703, 709, 710; *The Xantho*, 12 App. Cas. 503, 510, 515.

The English case most resembling in its circumstances the case at bar is *Leuw* v. *Dudgeon*, briefly reported in L. R. 3 C. P. 17 note, and more fully in 17 Law Times, (N. S.) 145, by which it appears to have been as follows: Cattle were shipped, some of them on deck, under a bill of lading containing these clauses: "Ship free in case of mortality, and from all damage arising from the act of God, the Queen's enemies, fire, accidents from machinery, or boilers, steam, or other dangers of the seas, rivers, roadsteads or steam navigation whatsoever." "The ship not liable for accident, injury, mortality, or jettison, whether shipped on deck or in the hold." On the vessel putting out to sea, she experienced fine weather and the sea was smooth, but there was a ground swell, and after she had been out some time she suddenly rolled over on her beam ends; the cattle pens gave way, and the cattle fell over to the starboard side, and in order to save the vessel it was

necessary to throw those on deck overboard. It was held that if the accident was owing to the vessel putting to sea with insufficient ballast, the owners were liable, notwithstanding the exemptions in the bill of lading, which included "jettison" as well as "accidents from dangers of the seas."

In that case, indeed, (as in the case in this court of *The Caledonia*, above cited,) the fault of the shipowner consisted in sending the ship to sea in an unseaworthy condition. But Mr. Justice Willes, who delivered the leading opinion, laid down the general rule that "the exceptions were intended to save the shipowner from liability for the effects of accident, and not to absolve him from the duty of exercising reasonable diligence." 17 Law Times, (N. S.) 146. And he treated the case as coming within the principle of that rule as affirmed in the cases, above cited, of *Phillips* v. *Clark* and *Grill* v. *General Iron Screw Colliery Co.*, in the one of which the clause "not to be accountable for leakage or breakage," and in the other the clause "accidents or dangers of the seas, rivers or navigation, of whatever nature or kind soever, excepted," was held not to cover a loss, otherwise within the exception, caused by the negligence of the master or crew. So in *Steel* v. *State Line Steamship Co.*, above cited, Lord Blackburn said, in the House of Lords, that in construing such exceptions in a bill of lading exactly the same considerations would arise as to the duty of the shipowner to furnish a ship really fit for the purpose, as had been applied, in the series of cases of which *Phillips* v. *Clark* was the leading one, to the duty of himself and his servants to use due care and skill in carrying the goods.

In *Notara* v. *Henderson*, L. R. 7 Q. B. 225, 236, the Court of Exchequer Chamber, in a considered judgment delivered by Mr. Justice Willes, held that the words "loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind, excepted," did not exempt the owner from negligence in omitting to take out and dry the cargo at a port of distress, because the authorities (specially mentioning *Grill*

v. *General Iron Screw Colliery Co.*, above cited,) "and the reasoning upon which they are founded are conclusive to show that the exemption is from liability for loss which could not have been avoided by reasonable care, skill and diligence, and that it is inapplicable to the case of a loss arising from the want of such care and the sacrifice of the cargo by reason thereof."

In *Gill* v. *Manchester &c. Railway*, L. R. 8 Q. B. 186, the Court of Queen's Bench, applying the same rule of construction, held that a provision in a contract for the carriage of cattle by railway, by which the railway company was not to be responsible for any loss or injury to the cattle "in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal," did not relieve the company from liability for negligence of its servants in delivering a restive cow.

In *Lloyd* v. *General Iron Screw Colliery Co.*, above cited, Lord Bramwell said that the words "accident or damage from machinery, boilers, steam," could not apply to an explosion caused by the wilful act of the engineer. 3 H. & C. 292.

The passages quoted by the respondent from *Burton* v. *English*, 12 Q. B. D. 218, 220, 223, as showing that the words "on deck at owner's risk" exempt the carrier from liability for unlawful jettison or for negligence of the master and crew, were *obiter dicta*, the only point decided being that those words did not exclude the right of the owner of the goods to recover in general average for a lawful jettison. See *Ralli* v. *Troop*, 157 U. S. 386, 396. The two other cases cited by the respondent were cases in which railway companies were held not to be responsible for the negligence of their servants under contracts essentially different from that now in question. One was an action by a passenger travelling as a drover accompanying cattle under a free pass, one of the terms of which was that he should travel at his own risk. *McCauley* v. *Furness Railway*, L. R. 8 Q. B. 57. The other was an action by a person who, knowing that the defendant had two rates of carriage, a higher rate when it took the ordinary liability of a carrier, and a lower rate when it was

relieved from all liability except that arising from the wilful misconduct of its servants, delivered goods to be carried at the lower rate under a contract in which the only words defining the carrier's liability were "owner's risk." *Lewis v. Great Western Railway*, 3 Q. B. D. 195.

Upon consideration of the conflicting testimony, with the aid of the careful arguments of counsel, no ground is shown for reversing or modifying the conclusions of fact reached by both courts below. Their concurrent decisions upon a question of fact are to be followed, unless clearly shown to be erroneous. *Morewood* v. *Enequist*, 23 How. 491; *The Richmond*, 103 U. S. 540, and cases cited; *The Conqueror*, 166 U. S. 110, 136.

By the facts so found, it appears that the cattle, for the loss of which a recovery has been permitted, were sound and uninjured animals, forcibly thrown or driven overboard, in rough weather, by order of the master, from unfounded apprehension on his part, in the absence of any pressing peril to the ship, and with no apparent or reasonable necessity for a jettison of the sound cattle, and no attempt to separate them from those which had already been injured by perils of the sea.

The clauses of the bill of lading, (other than the reference to British law,) on which the respondent relies, are those in the first paragraph, "on deck at owner's risk; steamer not to be held accountable for accident to, or mortality of the animals, from whatever cause arising;" and those in the third paragraph, by which "it is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters;" "by barratry of the master or crew;" or "by collisions, stranding, or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner."

The bill of lading itself shows that all the cattle to be carried under this contract were to be on deck. The words "on deck at owner's risk" cannot have been intended by the

parties to cover risks from all causes whatsoever, including negligent or wilful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading.

The wrongful jettison of the sound cattle by the act of the carrier's servants cannot reasonably, or consistently with the line of English authorities already cited, or with our own decisions, be considered either as an "accident to, or mortality of the animals," or as a "loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters," or yet as a loss or damage "by collisions, stranding, or other accidents of navigation." There having been no collision, stranding, or other accident of navigation, there was nothing to which the only stipulation in the bill of lading against the consequences of negligence, default, or error in judgment of the master and crew, could apply.

There was no barratry, because there was neither intentional fraud or breach of trust, nor wilful violation of law, one of which, at least, is necessary to constitute barratry. *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222; *Lawton* v. *Sun Ins. Co.*, 2 Cush. 500; *Grill* v. *General Iron Screw Colliery Co.*, above cited.

The facts of the case, therefore, do not bring it within any of the exceptions of the bill of lading, assuming them to be valid.

Decree affirmed.